Supreme Court, U.S.
FILED
DEC 07 2006
OFFICE OF THE CLERK

No. 06-805

In The

Supreme Court of the United States

PHILIP MORRIS USA, INC., et al.,

Petitioners,

v.

THE STATE OF MINNESOTA, COUNCIL OF INDEPENDENT TOBACCO MANUFACTURERS OF AMERICA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Minnesota Supreme Court

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI OF COUNCIL OF INDEPENDENT TOBACCO MANUFACTURERS OF AMERICA

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QUESTIONS PRESENTED

Petitioners argue the imposition of the Minnesota Health Impact Fee ("HIF") on Petitioners' cigarettes violates the Contracts Clause based on their Settlement Agreement with Minnesota – a Settlement Agreement in which Petitioners waived their First Amendment rights. Petitioners seek selective enforcement of the HIF, namely, enjoining enforcement of the HIF against their cigarettes while allowing enforcement of the HIF on cigarettes made by others. Respondent Cross-Petitioner Council of Independent Tobacco Manufacturers of America ("CITMA"), an association of tobacco manufacturers who are not parties to the Settlement Agreement and have not waived any of their First Amendment rights, argued selective enforcement of the HIF would violate the First Amendment and Equal Protection Clause. The trial court enjoined the HIF as a violation of the Settlement Agreement and ruled selective enforcement of the HIF was unconstitutional. The Minnesota Supreme Court reversed, holding the HIF did not violate the Settlement Agreement; therefore, it did not reach the issue of selective enforcement. The questions presented are:

1. Would selective enforcement of the HIF violate the First Amendment by taxing products made by parties who have refused to surrender their First Amendment rights and exempting products made by manufacturers who have surrendered their First Amendment rights?

QUESTIONS PRESENTED – Continued

2. Would selective enforcement of the HIF violate the Equal Protection Clause by discriminating based on a party's refusal to surrender its First Amendment rights and by drawing fundamentally unfair, arbitrary and capricious distinctions without any legitimate and rational legislative purpose?

PARTIES TO THE PROCEEDINGS

The parties to the proceeding are as follows. Petitioners are Philip Morris USA, Inc.; R.J. Reynolds Tobacco Company; Lorillard Tobacco Company; A.H. Hermel Candy & Tobacco Co.; Henry's Foods, Inc.; Sandstrom's Inc.; Johnson Candy and Tobacco Co. of Brainerd, Inc.; M. Amundson Cigar & Candy Company, LLP; The Watson Companies, Inc.; Granite City Jobbing Company, Inc.; Minter-Weisman Co.; Segal Wholesale, Inc.; and Tyler Wholesale, Inc. Respondents are the State of Minnesota; Intervenor Council of Independent Tobacco Manufacturers of America; and Intervenor Commonwealth Brands, Inc. Governor Tim Pawlenty participated as an *amicus curiae* in the proceedings below.

CORPORATE DISCLOSURE STATEMENT

Respondent-Cross-Petitioner Council of Independent Tobacco Manufacturers of America ("CITMA") is a Virginia non-stock corporation, which is an association of small, independent tobacco manufacturers. CITMA has no parent corporation and no publicly held company owns 10% or more of CITMA's stock.

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Respondent-Cross-Petitioner Council of Independent Tobacco Manufacturers of America ("CITMA") respectfully submits this conditional cross-petition for a writ of certiorari to review the judgment of the Minnesota Supreme Court.

OPINIONS AND ORDERS ENTERED IN THE CASE

The Minnesota Supreme Court's opinion is reported at 713 N.W.2d 350, and is set forth in Petitioners' Appendix at 1a-27a. The Order and Memorandum of the Ramsey County District Court is set forth in Petitioners' Appendix at 28a-38a.

BASIS FOR SUPREME COURT JURISDICTION

The Minnesota Supreme Court filed its judgment on June 21, 2006. Petitioners' Appendix at 39a-40a. This Court granted Petitioners an extension of time to file their petition for writ of certiorari up to and including November 3, 2006. Petitioners filed their Petition for Writ of Certiorari on November 3, 2006. This Court docketed Petitioners' Petition for Writ of Certiorari on November 6, 2006. CITMA timely submits this Conditional Cross-Petition for Writ of Certiorari. Sup. Ct. R. 12(5). This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . . and to petition the Government for a redress of grievances." U.S. Const., Amend. I. The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amend. XIV, § 1. The HIF, Minn. Stat. § 256.9658 (2006), is set forth in Petitioners' Appendix at 43a-44a. Minnesota's "Fee in Lieu of Settlement" statute, Minn. Stat. § 297F.24 (2006), which imposes a fee of $0.35 per pack of cigarettes solely on those cigarettes made by manufacturers other than Petitioners, is set forth in CITMA's Appendix, *infra*, at pages App. 75-App. 76.

STATEMENT OF THE CASE

I. The Minnesota Tobacco Lawsuit

The State of Minnesota ("State") sued the major cigarette manufacturers (hereafter referred to as "Petitioners") in 1994 (hereafter referred to as the "Minnesota Tobacco Lawsuit"). In the Minnesota Tobacco Lawsuit, the State alleged Petitioners knew "for decades from their own internal studies that their products are deadly and addictive," yet engaged in a "unified campaign of deceit and misrepresentation" in an effort to conceal this information. App. 49. The State asserted nine causes of action, including claims for consumer fraud, deceptive trade practices, false advertising, and anti-trust violations. App. 50. The

State sought injunctive relief, compensatory damages, and punitive damages for Petitioners' "willful indifference to the rights and safety of others" based on their conduct in selling their cigarettes. App. 50.

The State did not sue CITMA or any of its members. App. 50. The State has never accused CITMA or any of its members of engaging in any unlawful conduct in selling their tobacco products. App. 53.

II. Petitioners Surrendered Certain Of Their First Amendment Rights In The Settlement Of The Minnesota Tobacco Lawsuit.

In 1998, the State and Petitioners settled the Minnesota Tobacco Lawsuit. App. 50. Under the terms of the written Settlement Agreement, Petitioners agreed, among other things, to surrender certain of their fundamental First Amendment rights. Petitioners' Appendix at 110a, 112a-113a. Petitioners agreed to numerous restrictions on their constitutionally protected rights to freedom of speech and to petition the government for a redress of grievances, including the right to lobby the government and to challenge the constitutionality of certain laws regarding tobacco products. Petitioners' Appendix at 110, 112a-113a. These restrictions on constitutional rights included advertising restrictions far more onerous than the State could constitutionally impose on tobacco product manufacturers directly, such as removing all tobacco billboards and eliminating all tobacco ads on buses, taxis and bus shelters, ceasing payments to movie and television producers and ceasing distribution of promotional items, such as hats and t-shirts, bearing their products' brand names. Petitioners' Appendix at 112a-113a. Petitioners also promised not to oppose certain legislation impacting the

tobacco industry and to relinquish their rights to challenge the constitutionality of certain laws regarding tobacco products. Petitioners' Appendix at 110a.

Neither CITMA nor any of its members are parties to the Settlement Agreement. App. 53. Neither CITMA nor any of its members have surrendered any of their First Amendment rights. App. 53.

III. Minnesota's "Fee In Lieu Of Settlement" Tax On "Nonsettlement" Cigarettes

In 2003, Minnesota enacted the "Fee in Lieu of Settlement" statute which imposes a tax solely on "nonsettlement" cigarettes, defined as cigarettes made by manufacturers other than Petitioners. Minn. Stat. § 297F.24; App. 75-App. 76. This statute imposes a tax of $0.35 per pack on cigarettes made by non-settling manufacturers while expressly exempting Petitioners' cigarettes. Minn. Stat. § 297F.24, subd. 1(a), subd. 2; App. 75. According to its text, the purpose of this statute is to "(1) ensure that manufacturers of nonsettlement cigarettes pay fees to the state that are comparable to costs attributable to the use of the cigarettes; (2) prevent manufacturers of nonsettlement cigarettes from undermining the state's policy of discouraging underage smoking by offering nonsettlement cigarettes at prices substantially below the cigarettes of other manufacturers; and (3) fund such other purposes as the legislature determines appropriate." Minn. Stat. § 297F.24, subd. 1(b); App. 75. The State has represented to the Minnesota Supreme Court that this law "ensures that the price of every cigarette sold in Minnesota reflects state health care costs" by imposing a fee on nonsettlement cigarettes that approximates the voluntary

settlement payments the Petitioners are making to the State. App. 17. Accordingly, under this statute, non-settling manufacturers' cigarettes, including CITMA members' cigarettes, are already subject to a selectively enforced "fee" from which Petitioners' cigarettes are exempt.

IV. Minnesota Enacts The HIF On All Cigarettes Sold In Minnesota

Effective August 1, 2005, Minnesota enacted the HIF, imposing a $0.75 per pack "fee" on all cigarettes (and additional fees on other tobacco products) sold in Minnesota to be collected from "cigarette distributors and tobacco product distributors." Minn. Stat. § 256.9658; Petitioners' Appendix at 43a-44a. The HIF is imposed on all tobacco products in Minnesota regardless of who manufactures or sells the tobacco products. *Id.* The HIF's stated purpose is "to recover for the state health costs related to or caused by tobacco use and to reduce tobacco use, particularly by youths." Minn. Stat. § 256.9658, subd. 1; Petitioners' Appendix at 43a. A distributor of tobacco products "must pay the [HIF] fee at the same time and in the same manner as provided for payment of tax under chapter 297F," which governs tobacco excise taxes. Minn. Stat. § 256.9658, subd. 4; Petitioners' Appendix at 43a. Accordingly, the HIF imposes a "fee" on all tobacco products sold in Minnesota, and the State collects the "fee" pursuant to the mechanism in place for collection of tobacco excise taxes.

V. Petitioners Seek Selective Enforcement Of The HIF And CITMA Intervenes

In August 2005, Petitioners brought their Motion to Enforce Settlement Agreement, arguing the HIF violated the Settlement Agreement and the Contracts Clause. Petitioners' Appendix at 29a; App. 52-App. 53. Petitioners' motion sought an order exempting their cigarettes from the HIF while allowing the State to enforce the HIF against cigarettes made by persons other than Petitioners, including CITMA members. App. 52-App. 53. Accordingly, Petitioners requested the court to order the State to selectively enforce the HIF by imposing the HIF Fee on only those cigarettes that are made by manufacturers who, like CITMA members, have refused to relinquish any of their First Amendment rights, while exempting the Petitioners' own cigarettes. App. 52-App. 53.

In September 2005, CITMA moved to intervene to seek to ensure that CITMA members' cigarettes would be treated equally with cigarettes made by Petitioners. Petitioners' Appendix at 29a; App. 53. Respondent-Intervenor Commonwealth Brands, Inc. ("Commonwealth Brands") also moved to intervene to oppose selective enforcement of the HIF. Petitioners' Appendix at 29a. CITMA argued that selective enforcement of the HIF as to only those cigarettes made by non-settling manufacturers would violate the First Amendment and the Equal Protection Clause. Petitioners' Appendix at 5a; App. 54-App. 68. CITMA requested that the trial court either enjoin the HIF as to all cigarettes or allow the HIF to be imposed on all cigarettes. App. 74. Although Petitioners and the State opposed CITMA's and Commonwealth Brands' motions to intervene, the trial court allowed CITMA and Commonwealth Brands to

intervene, and this ruling was not challenged on appeal. Petitioners' Appendix at 29a-31a.

VI. The Trial Court Enjoins The HIF And Bars Selective Enforcement Of The HIF

On December 20, 2005, the trial court enjoined the HIF as against all cigarettes. Petitioners' Appendix at 2a, 28a-38a. Specifically, the trial court first enjoined the HIF as to Petitioners' cigarettes, ruling the HIF violated the Settlement Agreement and is unconstitutional. Petitioners' Appendix at 2a, 32a-36a. Next, the trial court ruled that the HIF must be enjoined as to cigarettes made by non-settling manufacturers, including CITMA members, because selectively enforcing the HIF against only cigarettes made by non-settling manufacturers would be unconstitutional. Petitioners' Appendix at 2a, 36a-38a.

VII. The Minnesota Supreme Court Reverses And Does Not Reach The Issue Of Selective Enforcement Of The HIF

The State appealed the trial court's ruling. On appeal, CITMA argued that selective enforcement of the HIF as to only those cigarettes made by non-settling manufacturers would violate the First Amendment and the Equal Protection Clause. App. 19-App. 40. The Minnesota Supreme Court reversed the trial court, ruling the HIF did not breach the Settlement Agreement or violate the Contracts Clause. Petitioners' Appendix at 1a-25a. Because the Minnesota Supreme Court ruled the HIF could be enforced against Petitioners' cigarettes, it did not reach the issue of selective enforcement of the HIF. Petitioners' Appendix at 25a ("Based on our ruling, the [HIF] will be enforced as to

[Petitioners'] products, and there remains no basis for the intervenors' claim[s] of selective enforcement.").

REASONS FOR GRANTING THE WRIT

This Court should grant CITMA's conditional cross-petition for a writ of certiorari because the very remedy sought by Petitioners – selective enforcement of the HIF – would violate the First Amendment and the Equal Protection Clause by punishing manufacturers who have refused to surrender their First Amendment rights by subjecting their products to the HIF Fee while exempting identical products made by parties who have surrendered their First Amendment rights. In addition, this case presents an excellent opportunity for this Court to clarify the unconstitutional conditions doctrine.

I. A Writ Of Certiorari Should Be Granted Because Selective Enforcement Of The HIF Would Violate The First Amendment

Selective enforcement of the HIF would violate the First Amendment because it would impose a fee on products made by manufacturers who have retained their First Amendment rights while exempting manufacturers who have surrendered their First Amendment rights. Just as it would be unconstitutional for the State to directly impose the Settlement Agreement's restrictions on tobacco product manufacturers' First Amendment rights, it is also unconstitutional to selectively enforce the HIF by imposing it on CITMA members' products because they have refused to

surrender such rights while exempting Petitioners' products because they have relinquished such rights.

This Court has held, as part of the unconstitutional conditions doctrine, that a state taxing scheme that punishes a taxpayer for retaining its First Amendment rights is unconstitutional. In *Speiser v. Randall*, 357 U.S. 513 (1958), this Court struck down a California tax law which granted a tax exemption to only those veterans who swore a loyalty oath. 357 U.S. at 518-519. Just as the state could not constitutionally require veterans to take the loyalty oath, the state likewise could not tax only those veterans who refused to take the loyalty oath. *Id.* Allowing the State to do so would allow it to unconstitutionally punish veterans who retained their First Amendment rights and to seek to coerce those veterans into surrendering their First Amendment rights. *Id.* In other words, "To deny [a tax] exemption to [parties] who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech," and it is therefore unconstitutional. *Id.* at 518.

This Court has explained that *Speiser* stands for the proposition that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). This is because if the government "could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited." *Id.* Thus, the government may not impose a penalty, such as a tax or fee, to "'produce a result which it could not command directly.'" *Id.* (quoting *Speiser*, 357 U.S. at 526).

In *FCC v. League of Women Voters*, 468 U.S. 364 (1988), this Court applied these principles and struck down a federal law that conditioned the grant of federal funds on whether a television station agreed to refrain from editorializing. This Court reasoned that, because editorializing is a right protected by the First Amendment, the government could not condition funding on a station's decision to surrender that right. *Id.* at 400-402. To allow the government to condition the receipt of funds on a waiver of First Amendment rights would unconstitutionally allow the government to punish those broadcasters who retained their First Amendment rights. *Id.*; *see also Rosenberger v. Rectors & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (public university could not condition grant of funds on student group's waiver of its First Amendment right to publish religious periodical); *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002) (statute that exempted certain drugs from FDA approval process, so long as drug providers agreed to surrender their right to advertise the drugs, violated First Amendment). In other words, because a state's "power to tax involves the power to destroy," *McCulloch v. Maryland*, 17 U.S. (Wheat) 316, 431 (1819), the government cannot use such power to punish taxpayers for refusing to surrender their First Amendment rights.

These principles apply no matter what the purpose or intent of the government is in enacting a tax law or providing a subsidy. As this Court explained decades ago, in "*Speiser v. Randall*, 357 U.S. 513 [1958], we emphasized that conditions upon public benefits cannot be sustained if they so operate, *whatever their purpose*, as to inhibit or deter the exercise of First Amendment freedoms." *Sherbert v. Verner*, 374 U.S. 398, 405 (1963) (emphasis added).

Indeed, in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105 (1991), this Court expressly *rejected* the government's argument that "discriminatory financial treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas." 502 U.S. at 117. This Court explained that the government's assertion was "incorrect," and that a party challenging a statute under the First Amendment "need adduce 'no evidence of improper censorial motive'" to succeed. *Id.* (quoting *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987)).

In the context of challenges to state tax laws that discriminate among similarly situated parties based on their First Amendment rights (as selective enforcement of the HIF would), this Court has specifically held that "improper censorial motive" is *not* required. *Leathers v. Medlock*, 499 U.S. 439, 445 (1991) (citing *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 572, 592 (1983)). As this Court explained, the Minnesota tax law in *Minneapolis Star & Tribune* violated the First Amendment despite the fact that there was "no evidence of impermissible legislative motive in the case apart from the structure of the tax itself." *Leathers*, 499 U.S. at 445. In fact, in *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991), this Court expressly *rejected* the government's argument that "discriminatory financial treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas." 502 U.S. at 177. The Court held the government's argument was "incorrect" because the party challenging the application of a law under the First Amendment "need adduce no evidence of improper censorial motive" to succeed. *Id.* Therefore, the improper burden

on CITMA members' First Amendment rights imposed by selective enforcement of HIF is more than sufficient to establish that such selective enforcement would be unconstitutional.

The lobbying, commercial speech and access to the Court restrictions Petitioners agreed to in the Settlement Agreement resolving the Minnesota Tobacco Lawsuit would be unconstitutional if imposed directly by the government.[1] Neither the State nor Petitioners dispute this.

Selective enforcement of the HIF would violate the First Amendment by taxing all products made by parties that have refused to surrender their First Amendment rights and exempting all products made by parties that have surrendered their First Amendment rights. In this way, selective enforcement of the HIF would draw a

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[1] First, if imposed directly, the lobbying restrictions in the Settlement Agreement would be unconstitutional. The right to lobby is part of the overall right to petition the government for a redress of grievances, which "extends to all departments of the Government," *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972), and is considered "core" political speech protected by the First Amendment. *E R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961). Indeed, this Court has long "recognized this right to petition as one of the most precious of the liberties safeguarded by the Bill of Rights." *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 524 (2002) (internal quotation omitted). Second, if imposed directly by the State, the commercial speech restrictions contained in the Settlement Agreement would be unconstitutional. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001) (holding advertising restrictions nearly identical to those contained in the Settlement Agreement violated the First Amendment). Finally, the restrictions on access to the courts to "challenge the enforceability or constitutionality of" certain laws regulating tobacco contained in the Settlement Agreement would be unconstitutional if imposed directly by the State. *Cal. Motor*, 404 U.S. at 510, 513.

discriminatory and unconstitutional distinction based on whether the tobacco manufacturer has waived its First Amendment rights. Accordingly, such selective enforcement would be unconstitutional because it would effectively condition the right of CITMA members to engage in advertising and lobbying protected by the First Amendment on the payment of the HIF Fee on their products. *See Minneapolis Star & Tribune*, 460 U.S. at 586 n.9 ("By imposing the tax as a condition of engaging in protected activity, [the government] imposed a form of prior [unconstitutional] restraint on speech"); *Follett v. Town of McCormick*, 321 U.S. 573, 577 (1944) ("The exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment is as obnoxious . . . as the imposition of the censorship or a previous restraint.") Indeed, the principle of *Speiser*, that the government may not condition the provision of a tax exemption on the surrender of First Amendment rights, compels a ruling that selective enforcement of the HIF would be unconstitutional because it would exempt from the HIF Fee only those products made by manufacturers who have surrendered their First Amendment rights and impose the HIF Fee on those products made by parties who have refused to surrender their First Amendment rights. *Speiser*, 357 U.S. at 518; *see also Perry*, 408 U.S. at 597.

II. A Writ Of Certiorari Should Be Granted Because Selective Enforcement Of The HIF Would Violate The Equal Protection Clause

Selective enforcement of the HIF would also violate the Equal Protection Clause of the Fourteenth Amendment because it would burden fundamental rights by applying

the HIF Fee to products made by parties that have refused to surrender their First Amendment rights, while exempting products made by manufacturers who have relinquished such rights. The Equal Protection Clause "protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class." *Hillsborough v. Cromwell*, 326 U.S. 620, 623 (1946). "It is well established that a corporation is a 'person' within the meaning of the Fourteenth Amendment." *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 881 n.9 (1985).

Selective enforcement of the HIF on only those tobacco products made by non-settling manufacturers would be subject to strict scrutiny because it would discriminate against tobacco manufacturers who have refused to surrender their fundamental constitutional rights. The proper test to be applied to a fee or tax under the Equal Protection Clause depends on whether the fee or tax is based on a suspect classification (such as race), or punishes the exercise or retention of the taxpayer's constitutional rights (such as freedom of speech). If the fee or tax is not imposed based on a suspect classification or does not punish fundamental constitutional rights, it is generally evaluated under the rational basis test. *Minneapolis Star & Tribune Co.*, 460 U.S. at 582-583. However, if a tax or fee would punish the exercise or retention of a constitutional right, the statute must satisfy "strict scrutiny." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Under strict scrutiny, a statute's classifications "are constitutional only if they are narrowly tailored measures that further compelling government interests." *Adarand Contractors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

For example, in *Minneapolis Star & Tribune*, this Court applied strict scrutiny and struck down a Minnesota tax which unconstitutionally burdened First Amendment rights. 460 U.S. at 592-593. The case involved Minnesota's use tax on the cost of paper and ink products consumed in the production of periodic publications. This Court held that a "tax that burdens rights protected by the First Amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest." *Id.* at 582. This Court further held that the State's asserted interest in raising revenue – an interest "critical to any government" – was insufficient to justify the differential treatment because the State "could raise the revenue by taxing businesses generally" and thereby avoid a tax that punishes the exercise of First Amendment rights. *Id.* at 586. Accordingly, the statute was unconstitutional. *Id.*

The analysis and holding in *Minneapolis Star & Tribune* compel the conclusion that selective enforcement of the HIF would be unconstitutional. As with the statute in *Minneapolis Star & Tribune*, selective enforcement of the HIF would be subject to strict scrutiny because it would burden CITMA members' and other non-settlement tobacco manufacturers' First Amendment rights. Such selective enforcement would tax non-settlement tobacco manufacturers' products based on their refusal to relinquish their First Amendment rights while exempting cigarettes made by parties who have surrendered their First Amendment rights. As with the statute in *Minneapolis Star & Tribune*, this would fail the strict scrutiny test because it is not narrowly tailored to further a compelling government interest.

Further, even if the strict scrutiny test did not apply to the selective enforcement of the HIF, which it does, such

selective enforcement would violate the Equal Protection Clause under rational basis review because selective enforcement would draw fundamentally unfair, arbitrary and capricious distinctions without any legitimate or rational legislative purpose.

Selective enforcement of the HIF would be contrary to the legislature's stated purposes: (1) recovering revenue for the health-related costs of tobacco products; and (2) reducing smoking, particularly youth smoking. Minn. Stat. § 256.9658, subd. 1. If the HIF Fee is applied only to non-settling manufacturers' cigarettes, which comprise less than 10 percent of the market, the State will initially recover very little revenue, and that revenue will inevitably shrink as smokers switch to Petitioners' cigarettes which would be exempt from the HIF Fee.

Also, non-settling manufacturers have never been sued by the State for false advertising, consumer fraud or any other unlawful conduct in selling their cigarettes, showing that non-settlement manufacturers are *less* responsible for the health costs of smoking. Moreover, the non-settling manufacturers' cigarettes are already subject to the "Fee in Lieu of Settlement" statute which is imposed on only non-settlement manufacturers' products while exempting Petitioners' products. Minn. Stat. § 297F.24; App. 75-76. Accordingly, because the non-settling manufacturers are already subject to this selectively imposed fee, imposing an additional selectively enforced HIF Fee would be irrational and contrary to the legislature's expressed intent to treat all cigarettes equally under the HIF. As such, it would violate the Equal Protection Clause. *McLaughlin v. Florida*, 379 U.S. 184, 190-191 (1964) (distinctions drawn in a statute must be "reasonable in light of its purpose" to comply with equal protection).

Further, selective enforcement of the HIF would not serve the statute's purpose of reducing smoking, particularly by youth. Imposing the fee on only 10 percent of the cigarettes sold in Minnesota will not cause the price of all cigarettes to rise, but will simply drive smokers, including youth, to choose products made by Petitioners. Indeed, the State's own statistics show that Petitioners' cigarettes are responsible for at least 88 percent of underage sales.[2] Because youth overwhelmingly choose to smoke Petitioners' cigarettes rather than those made by non-settling manufacturers, it is clear non-settlement manufacturers are *less* responsible for youth smoking. It would be arbitrary and irrational for the State to apply the HIF exclusively to non-settlement cigarettes, which account for relatively few underage sales, while exempting cigarettes made by Petitioners, which account for almost all underage sales. Because selective enforcement of the HIF would exempt the very cigarettes that are responsible for the vast majority of underage sales, selective enforcement would not be rationally related to the statute's stated

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[2] Minnesota Department of Health, *Results from the Minnesota Youth Tobacco Survey*, p. v (Dec. 2000) (available at www.health.state.mn.us/divs/hpcd/tpc/TobaccoReports.html#youth); *see also* Minnesota Department of Health, *Changes in Tobacco Use by Minnesota Youth, 2000-2005*, p. 10 (Dec. 2005) (available at www.health.state.mn.us/divs/hpcd/tcp/TobaccoReports.html#youth) (of Minnesota teens who smoke, 84% of them smoke one of the three most heavily advertised brands (Marlboro, Camel or Newport), each of which is made by one of the Petitioners); Minnesota Department of Health, *Patterns of Smoking Among Minnesota's Young Adults, January 2004* (available at www.health.state.mn.us/divs/hpcd/tpc/TobaccoReports.html#youth) (preferences for Petitioners' brands "are established during middle school and high school," but such brand preferences tend to decrease with age); Healton, et al., *Youth Smoking Prevention and Tobacco Industry Revenue*, 15 Tobacco Control 103, 105 (2006) (in 2002, 90% of "youth generated tobacco industry revenue" went to Petitioners).

purpose of curbing underage smoking. As such, it would be unconstitutional. *McLaughlin*, 379 U.S. at 190-191; *see also Allegheny Pittsburg Coal Co. v. County Comm'n*, 488 U.S. 336 (1989) (tax assessor's practices violated equal protection because certain properties received dramatically higher assessments than neighboring, comparable properties; administrative convenience alone was insufficient to support disparity); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985) (tax exemption for Vietnam War veterans limited to those who had moved to the state before a certain date prior to the passage of statute violated equal protection); *Zobel v. Williams*, 457 U.S. 55 (1982) (statute distributing mineral royalties to residents based upon how long they had lived in the state violated equal protection); *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32 (1928) (state law imposing recording tax on all mortgages, but arbitrarily exempting mortgages that matured in five years violated equal protection).

III. A Writ Of Certiorari Should Be Granted Because This Case Presents An Excellent Opportunity For This Court To Clarify The Unconstitutional Conditions Doctrine

This case presents an excellent opportunity for this Court to clarify the unconstitutional conditions doctrine. Lower courts and commentators have correctly noted that this Court's unconstitutional conditions doctrine is difficult to apply in cases involving taxes, tax exemptions and government subsidies, and that the doctrine's application often leads to inconsistent results. *See, e.g.*, *Alliance for Open Society Int'l, Inc. v. U.S. Agency for Int'l Development*, 430 F. Supp. 2d 222, 253 (S.D.N.Y. 2006) (unconstitutional

conditions doctrine, "while seemingly straightforward when stated in the abstract, in practice has proven difficult to apply"); *Legal Aid Society of Haw. v. Legal Servs. Corp.*, 961 F. Supp. 1402, 1411-1412 (D. Haw. 1997) ("The issue of subsidies/penalties and the First Amendment has bedeviled courts for years" and applying the unconstitutional conditions doctrine to determine "'the constitutionality of government subsidization of expression is one of the most frustrating tasks . . . of the First Amendment.'") (quoting Martin H. Redish and Daryl Kessler, *Government Subsidies and Free Expression*, 80 Minn. L. Rev. 543, 544 (1996)); Erwin Chemerinsky, *Constitutional Law: Principles and Policies*, § 11.2.4.4, at 796 (1997) ("[T]he Court . . . has not consistently applied the unconstitutional conditions doctrine."); Richard A. Epstein, *Bargaining With The State*, 12-14 (1993) (providing in-depth discussion of this Court's irreconcilable penalty/nonsubsidy distinction in applying the unconstitutional conditions doctrine). Indeed, Professor Chemerinsky has suggested:

> [P]erhaps the cases cannot be reconciled and the decisions simply turn on the views of the Justices in particular cases. If the Court wishes to strike down a condition, it declares it to be an unconstitutional condition; if the Court wishes to uphold a condition, it declares that the government is making a permissible choice to subsidize some activities and not others.

Chemerinsky, *supra*, *Constitutional Law: Principles and Policies*, § 11.2.4.4, at 798.

And Professor Chemerinsky is not alone. Judge Michael McConnell, while he was a law professor, argued that this Court tends "to approach the problem of selective funding by reasoning backwards from the desired result"

while purportedly applying the unconstitutional conditions doctrine. Michael W. McConnell, *The Selective Funding Problem: Abortion and Religious Schools*, 104 Harv. L. Rev. 989, 992 (1991). Another commentator contends that this Court's unconstitutional conditions doctrine cases are "marked by shallow analysis and deep contradiction," and that this "Court has been unable to articulate a coherent, formal sorting principle to harmonize its seemingly intuitive and inconsistent approaches to unconstitutional conditions cases." Jonathan Romberg, *Is There a Doctrine in the House? Welfare Reform and the Unconstitutional Conditions Doctrine*, 22 Fordham Urb. L.J. 1051, 1076, 1080 (1995). Another scholar has flatly proclaimed that "the doctrine of unconstitutional conditions is riven with inconsistencies." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1416 (1989); *see also id.* at 1420 ("[C]onclusory labels often take the place of analysis ... [as] conditional benefits are frequently deemed 'penalties' when struck down and 'nonsubsidies' when upheld.") (footnote omitted). Further, at least one court has stated that the "coercion test" of the unconstitutional conditions doctrine as applied to federal grants to states "is ill-conceived and probably unworkable." *Kansas v. United States*, 24 F. Supp. 2d 1192, 1198 (D. Kan. 1998).

The difficulty in applying and understanding the unconstitutional conditions doctrine has lead directly to splits of authority among the lower courts in resolving challenges to state statutes governing tobacco fees, taxes and escrow payments. For example, 46 states are parties to the 1998 Mater Settlement Agreement ("MSA"),[3] which

[3] The text of the Master Settlement Agreement is available at www.naag.org/backpages/naag/tobacco/msa.

resolved the lawsuits those states commenced against Petitioners. As in the Minnesota Settlement Agreement, Petitioners waived certain of their fundamental First Amendment rights in the MSA. Pursuant to the MSA, each of the 46 states has enacted a "Qualifying Statute" which requires cigarette manufacturers who are not parties to the MSA to pay amounts into escrow accounts. These escrow payments are meant to approximate the amounts the non-settlement manufacturers would have paid the states under the MSA if they were parties to the MSA.

Certain cigarette manufacturers who are not parties to the MSA have challenged some of these state Qualifying Statutes, claiming the laws violate their First Amendment rights under the unconstitutional conditions doctrine. Because of the uncertainty and inconsistency in the unconstitutional conditions doctrine, however, lower courts have reached opposite conclusions in these challenges. *Compare Xcaliber Int'l Ltd., LLC v. Foti*, 442 F.3d 233 (5th Cir. 2006), reversing *Xcaliber Int'l Ltd., LLC v. Ieyoub*, 377 F. Supp. 2d 567 (E.D. La. 2005), (Fifth Circuit holds tobacco manufacturer could pursue First Amendment unconstitutional conditions challenge to Louisiana's Qualifying Statute), *with Star Scientific, Inc. v. Beales*, 278 F.3d 339 (4th Cir. 2002) (Fourth Circuit rejects First Amendment unconstitutional conditions challenge to Virginia's Qualifying Statute); *S&M Brands, Inc. v. Summers*, 393 F. Supp. 2d 604, 637-638 (M.D. Tenn. 2005) (rejecting First Amendment unconstitutional conditions challenge to Tennessee's Qualifying Statute); *PTI, Inc. v. Philip Morris, Inc.*, 100 F. Supp. 2d 1179 (C.D. Cal. 2000) (rejecting First Amendment unconstitutional conditions challenge to California's Qualifying Statute).

Likewise, at least three states have passed statutes nearly identical to Minnesota's "Fee in Lieu of Settlement" statute, all of which impose taxes on only those cigarettes made by parties who have refused to surrender their First Amendment rights while expressly exempting cigarettes made by parties who have surrendered their First Amendment rights by joining the MSA. *See* Alaska Stat. § 43.50.200 (2006) (imposing an "excise tax" of 25 cents per pack on cigarettes made by manufacturers who have not surrendered their First Amendment rights by joining in the MSA); Mich. Comp. Laws § 205.426(d) (2006) (imposing an "equity assessment" of 35 cents per pack on all cigarettes made by manufacturers who have not surrendered their First Amendment rights by joining the MSA); Utah Code Ann. § 59-14-214 (2006) (imposing an "equity assessment" of 35 cents per pack on all cigarettes made by manufacturers who have not surrendered their First Amendment rights by joining the MSA); Minn. Stat. § 297F.24; App. 75-App. 76 (imposing 35 cent per pack "fee" on all cigarettes made by manufacturers who have not surrendered their First Amendment rights in a settlement agreement with the state). These statutes all operate in a manner similar to the HIF if the HIF was selectively enforced, and all of these statutes should therefore be unconstitutional. *But see Council of Independent Tobacco Mfrs. of Am. v. State*, 713 N.W.2d 300 (Minn. 2006) (rejecting First Amendment unconstitutional conditions challenge to Minnesota's Fee in Lieu of Settlement statute).

This case presents an excellent opportunity for this Court to clarify the unconstitutional conditions doctrine and make clear that the *Speiser/Perry* line of unconstitutional conditions cases are alive and well, and that state tax statutes which discriminate among otherwise identically

situated parties based upon whether the party has retained its First Amendment rights constitutes an unconstitutional condition. Without such clear guidance, lower courts will continue to have difficulty applying the unconstitutional conditions doctrine and will continue to issue inconsistent holdings and results. This Court should take the opportunity to change this course by granting CITMA's conditional cross-petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons, CITMA's conditional cross-petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 7, 2006

No. A-05-2540

STATE OF MINNESOTA IN SUPREME COURT

THE STATE OF MINNESOTA, BY HUBERT H. HUMPHREY, III, ITS THEN ATTORNEY GENERAL

Appellant,

v.

PHILIP MORRIS USA, INC., et al., A.H. HERMEL CANDY & TOBACCO CO., et. al., COUNCIL OF INDEPENDENT TOBACCO MANUFACTURERS OF AMERICA, and COMMONWEALTH BRANDS, INC.,

Respondents.

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STATEMENT OF THE ISSUES

1. Whether selective enforcement of the Tobacco Health Impact Fee ("HIF") on only those tobacco products made by non-settling manufacturers would violate the First Amendment by taxing products made by parties who have refused to relinquish their First Amendment rights and exempting products made by manufacturers who have surrendered their First Amendment rights.

The District Court ruled that selective enforcement of the HIF would be unconstitutional.

Apposite Cases:

Speiser v. Randall, 357 U.S. 513 (1958)
Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575 (1983)
Perry v. Sindermann, 408 U.S. 593 (1972)
FCC v. League of Women Voters, 468 U.S. 364 (1988)

2. Whether selective enforcement of the HIF would violate the Equal Protection Clause and the Uniformity Clause because it would discriminate based on a party's refusal to surrender its First Amendment rights and because it would draw fundamentally unfair, arbitrary and

capricious distinctions without any legitimate and rational legislative purpose.

The District Court ruled that selective enforcement of the HIF would violate the Equal Protection Clause and the Uniformity Clause.

Apposite Cases:

Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575 (1983)
Nat'l Tea Co. v. State, 208 Minn. 607, 294 N.W. 230 (1940)
Minn. Cable Communications Ass'n v. Minn. Cable Communications Bd., 288 N.W.2d 721 (Minn. 1980)

3. Whether selective enforcement of the HIF would violate the Minnesota Constitution's prohibition against special legislation by granting Settling Defendants special and exclusive privileges and immunities.

The District Court ruled that selective enforcement of the HIF would be unconstitutional and "the functional equivalent" of prohibited "special legislation."

Apposite Cases:

In re Tveten, 402 N.W.2d 551 (Minn. 1987)
Wm. Warnock Co. v. H.D. Hudson Mfg. Co., 200 Minn. 196, 273 N.W. 710 (1937)

4. Whether selective enforcement of the HIF would violate the Bill of Attainder Clause of the United States Constitution by punishing non-settling tobacco manufacturers for alleged past conduct without the benefits and protections of a judicial trial.

The District Court ruled that selective enforcement of the HIF would be unconstitutional.

Apposite Cases:

Nixon v. Adm'r of Gen. Servs., 433 U.S. 425 (1977)
United States v. Brown, 381 U.S. 437 (1965)
United States v. Lovett, 328 U.S. 303 (1946)
Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866)

STATEMENT OF THE CASE

In August 1994, the State, by then-Attorney General Hubert H. Humphrey III, commenced the above captioned action (hereafter the "State Tobacco Lawsuit") against the defendants, including Defendants-Respondents Philip Morris USA, Inc., R.J. Reynolds Tobacco Company and Lorillard Tobacco Company (hereafter, the "Settling Defendants"). CITMA App. 1-39.[1] The State alleged that the Settling Defendants knew "for decades from their own internal studies that their products are deadly and addictive," yet engaged in a "unified campaign of deceit and misrepresentation" in an effort to conceal this information. CITMA App. 2. The State asserted claims for, among other things, consumer fraud, deceptive trade practices, false advertising, and anti-trust violations, and the State sought punitive damages for Settling Defendants' "willful indifference to the rights and safety of others." CITMA App. 1-39. The State did not sue Respondent-Intervenor Council of Independent Tobacco Manufacturers of America ("CITMA") or any of its members.

[1] "CITMA App." refers to CITMA's Appendix. "App." refers to the State's Appendix.

The State settled with the Settling Defendants in 1998. App. 37-82. Under the terms of the written Settlement Agreement, the Settling Defendants agreed to make payments to the State in perpetuity and to surrender certain of their fundamental First Amendment rights. *Id.*

In August 2005, Settling Defendants and their Distributors brought their Motion to Enforce Settlement Agreement. App. 1-5. Settling Defendants argued that the 2005 Tobacco Health Impact Fee ("HIF") violated the Settlement Agreement and the Contracts Clause of the United States Constitution. App. 1-5; 33-36. The Settling Defendants' motion sought an order exempting the Settling Defendants' tobacco products from the HIF while allowing the State to enforce the HIF against products made by persons other than Settling Defendants, including CITMA members. App. 1-5; CITMA App. 40-57. Accordingly, Settling Defendants requested that the District Court order the State to selectively enforce the HIF by imposing the Fee on only those tobacco products that are made by manufacturers who, like CITMA members, have refused to relinquish their fundamental constitutional rights, while exempting the Settling Defendants' own products. *Id.* The State and Amicus Curiae Governor Pawlenty opposed the Settling Defendants' motion.

In September 2005, CITMA, a group of small tobacco companies who have never been accused of any illegal activity by the State, moved to intervene to seek to ensure that CITMA members' tobacco products would be treated equally with tobacco products made by Settling Defendants. CITMA App. 58-79. Respondent-Intervenor Commonwealth Brands, Inc. ("Commonwealth Brands") also moved to intervene to oppose selective enforcement of the HIF. CITMA argued that selective enforcement of the HIF

as to only those tobacco products made by non-settling manufacturers would violate several provisions of the United States and Minnesota Constitutions, including the First Amendment, the Equal Protection Clause, the Uniformity Clause, and the prohibitions on bills of attainder and special legislation. CITMA App. 80-101. CITMA requested that the District Court either enjoin the HIF as to all tobacco products or allow the HIF to be imposed on all tobacco products. CITMA App. 101. Settling Defendants and the State opposed CITMA's and Commonwealth Brands' motions to intervene.

On September 29, 2005, the District Court heard arguments on Settling Defendants' Motion to Enforce Settlement Agreement and CITMA's and Commonwealth Brands' motions to intervene. App. 9. At the hearing, the District Court orally ruled that CITMA and Commonwealth Brands could intervene under Minnesota Rule of Civil Procedure 24.01 and 24.02. App. 9.

On December 20, 2005, the District Court enjoined the HIF as against all tobacco products. App. 6-18. Specifically, the District Court enjoined the HIF as to the Settling Defendants' tobacco products because the HIF violated the Settlement Agreement and is unconstitutional. App. 9, 11-16. The District Court also enjoined the HIF as to tobacco products made by non-settling manufacturers, including CITMA members, because enforcing the HIF against tobacco products made by non-settling manufacturers would be unconstitutional. App. 9, 16-18.

The State appealed and sought accelerated review in this Court. App. 28-30. On January 19, 2006, this Court granted the State's request for accelerated review.

STATEMENT OF THE FACTS

I. THE STATE SUED THE SETTLING DEFENDANTS TO RECOVER DAMAGES FOR HARM CAUSED BY THEIR FRAUDULENT AND UNLAWFUL CONDUCT.

In the State Tobacco Lawsuit, the State asserted claims for monetary, equitable and injunctive relief, and sought to place responsibility upon the Settling Defendants for costs incurred, and to be incurred, by the State arising from the conduct of the Settling Defendants in selling their tobacco products. CITMA App. 1-39. The State asserted nine causes of action, including claims for consumer fraud, false advertising, deceptive trade practices and anti-trust violations. *Id.* The State alleged that the Settling Defendants "knew for decades from their own internal studies that their products are deadly and addictive," yet engaged in a "unified campaign of deceit and misrepresentation" in an effort to conceal this information. CITMA App. 2. The State sought punitive damages, alleging that the Settling Defendants' conduct "demonstrate[d] a willful indifference to the rights or safety of others." CITMA App. 36. The State did not sue CITMA or any of its members. The State has never accused CITMA or any of its members of engaging in unlawful conduct in selling their tobacco products.

II. THE STATE AND THE SETTLING DEFENDANTS REACHED A SETTLEMENT UNDER WHICH THE SETTLING DEFENDANTS AGREED TO MAKE SUBSTANTIAL PAYMENTS AND SURRENDER CERTAIN FIRST AMENDMENT RIGHTS.

The State and Settling Defendants reached a settlement of the State Tobacco Lawsuit in May 1998. App. 37-82. The District Court also entered a Consent Judgment regarding the settlement. App. 72-82. Under the Settlement Agreement, Settling Defendants agreed to make payments to the State and surrender certain of their First Amendment rights. App. 44-50, 54-58, 68. Settling Defendants agreed to pay an estimated $6.1 billion over the first 25 years, with each manufacturer's payment calculated in proportion to its respective United States market share. *Id.*

Importantly, the Settling Defendants also agreed to numerous restrictions on their constitutionally protected rights to freedom of speech and to petition the government for a redress of grievances, including the right lobby the government and to challenge the constitutionality of certain laws regarding tobacco products. App. 54-58. These restrictions on constitutional rights included advertising restrictions far more onerous than the State could constitutionally impose on tobacco product manufacturers directly, such as removing all tobacco billboards and eliminating all tobacco ads on buses, taxis and bus shelters, ceasing payments to movie and television producers and ceasing distribution of promotional items, such as hats and t-shirts, bearing their products' brand names. *Id.* The Settling Defendants also promised not to oppose certain legislation impacting the tobacco industry and to relinquish their rights to challenge the constitutionality of

certain laws regarding tobacco products. *Id.* Thus, in the Settlement Agreement, the Settling Defendants relinquished and agreed not to exercise many of their fundamental constitutional rights, including their right to freedom of speech and their right to petition the government for a redress of grievances as guaranteed by the First Amendment to the United States Constitution and Article I, Section 3 of the Minnesota Constitution.

III. THE MINNESOTA CIGARETTE EXCISE TAX AND THE "FEE IN LIEU OF SETTLEMENT" STATUTE.

At the time the Settlement Agreement was negotiated and executed, the State imposed an excise tax of $.48 per pack upon the sale of cigarettes. *See* Minn. Stat. § 297F.05, subd. 1 (Supp. 1997). The State has and continues to collect this cigarette excise tax from distributors, including distributors of the Settling Defendants' tobacco products, as well as excise taxes on other tobacco products. *See* Minn. Stat. § 297F.05, subd. 1, subd. 3 (2005).

In 2003, the State enacted the "Fee in Lieu of Settlement" statute which imposes a fee solely on those cigarettes made by "non-settling manufacturers" – manufacturers other than the Settling Defendants. *See* Minn. Stat. § 297F.24. The statute imposes a "fee" of $.35 per pack on cigarettes made by non-settling manufacturers while exempting Settling Defendants' cigarettes. Minn. Stat. § 297F.24, subd. 1(a), subd. 2. This statute has been challenged by CITMA and other parties in an action pending before this Court. *See CITMA v. State*, 685 N.W.2d 467 (Minn. Ct. App. 2004), *review granted* Nov. 16, 2004, oral argument presented April 11, 2005. According to its text, the purpose of this statute is to "(1) ensure that

manufacturers of nonsettlement cigarettes pay fees to the state that are comparable to costs attributable to the use of the cigarettes; (2) prevent manufacturers of nonsettlement cigarettes from undermining the state's policy of discouraging underage smoking by offering nonsettlement cigarettes at prices substantially below the cigarettes of other manufacturers; and (3) fund such other purposes as the legislature determines appropriate." Minn. Stat. § 297F.24, subd. 1(b). The State has told this Court that this statute "ensures that the price of *every* cigarette sold in Minnesota reflects state health care costs" by imposing a fee on non-settlement cigarettes that approximates the voluntary settlement payments the Settling Defendants are making to the State. Respondents' Brief in *CITMA v. State*, Minn. Sup. Ct. Case No. A-03-2020 at 11, 16-22. Accordingly, under this statute, nonsettling manufacturers' cigarettes, including CITMA members' cigarettes, are already subject to one selectively enforced "fee" from which the Settling Defendants' cigarettes are exempt.

IV. THE STATE ENACTS THE HIF ON ALL TOBACCO PRODUCTS.

Effective August 1, 2005, the State enacted the HIF to be collected from all "cigarette distributors and tobacco product distributors." App. 33-36. The HIF is to be imposed on all tobacco products in Minnesota regardless of who manufactures or sells the tobacco products. *Id.* The HIF's stated purpose is "to recover for the state health costs related to or caused by tobacco use and to reduce tobacco use, particularly by youths." *Id.* A distributor of tobacco products "must pay the [HIF] fee at the same time and in the same manner as provided for payment of tax

under chapter 297F," which governs tobacco excise taxes. *Id.* The HIF is to be administered as provided by the provisions in chapters 270C and 297F, which govern administration of excise taxes on tobacco products. *Id.* Accordingly, the HIF imposes a "fee" on *all* tobacco products sold in Minnesota, and the State collects the "fee" pursuant to the mechanism in place for collection of tobacco excise taxes. *Id.*

V. SETTLING DEFENDANTS SOUGHT SELECTIVE ENFORCEMENT OF THE HIF.

On August 26, 2005, Settling Defendants brought their Motion to Enforce Settlement Agreement. App. 1-5. Settling Defendants' motion specifically requests that this Court exempt Settling Defendants' tobacco products from the HIF while allowing the State to continue to collect the HIF from distributors selling tobacco products made by persons other than Settling Defendants, including CITMA members. *Id.*; CITMA App. 40-57. Thus, Settling Defendants requested that the District Court order the State to selectively enforce the HIF by imposing the Fee on only those tobacco products that are made by manufacturers who, like CITMA members, have refused to relinquish their fundamental constitutional rights, while exempting Settling Defendants' own products.

VI. CITMA DOES NOT WANT THE HIF TO BE SELECTIVELY ENFORCED.

Intervenor CITMA, a Virginia non-stock corporation, is an association of small, independent tobacco manufacturers located throughout the United States. CITMA App. 61-69. No CITMA members were parties to the State

Tobacco Lawsuit, or the settlement thereof, and no CITMA members agreed to surrender any of their constitutional rights as part of any settlement with the State. *Id.* No CITMA members want to relinquish their First Amendment rights. *Id.* No CITMA members have ever been accused of the conduct alleged against the Settling Defendants in the State Tobacco Lawsuit. *Id.* The tobacco products manufactured by CITMA members are not fundamentally different from the tobacco products manufactured by the Settling Defendants. *Id.*

CITMA members do not want the HIF to be selectively enforced against their products while the Settling Defendants' products are exempt. *Id.* Selective enforcement of the HIF against only those tobacco products manufactured by non-settling manufacturers would substantially harm CITMA and its members by causing their tobacco products to be significantly more expensive than the Settling Defendants' essentially identical tobacco products. *Id.*

SUMMARY OF THE ARGUMENT

The District Court correctly ruled that selective enforcement of the HIF on only non-settlement tobacco products would be unconstitutional because imposition of the HIF Fee on only non-settlement tobacco products would violate the Minnesota and United States Constitutions.

First, selective enforcement of the HIF on only those tobacco products made by non-settling manufacturers would violate the First Amendment because it would punish CITMA members and other non-settling manufacturers who have refused to surrender their First Amendment rights by subjecting their products to the HIF while

exempting the products made by Settling Defendants who have surrendered fundamental First Amendment Rights.

Second, selective enforcement of the HIF would violate the Equal Protection Clause of the United States Constitution and the Uniformity Clause of the Minnesota Constitution because it would discriminate against CITMA members and other non-settling tobacco product manufacturers by subjecting their products to the Fee as a result of their refusal to surrender their First Amendment rights while exempting products made by the Settling Defendants who have surrendered their rights. Selective enforcement of the HIF would also violate the Equal Protection Clause and Uniformity Clause because it would draw a fundamentally unfair, arbitrary and capricious distinction among tobacco product manufacturers without serving any legitimate and rational legislative purpose. Indeed, selective enforcement would reward Settling Defendants, manufacturers who the State alleged engaged in decades of unlawful conduct, to the detriment of manufacturers who have never engaged in such conduct.

Third, selective enforcement of the HIF would constitute unconstitutional special legislation prohibited by the Minnesota Constitution by granting special and exclusive privileges and immunities to Settling Defendants while denying them to non-settling manufacturers without any legitimate and rational basis. Finally, selective enforcement of the HIF would constitute an unconstitutional bill of attainder because it would penalize CITMA members and other non-settling manufacturers for purported conduct that has neither been alleged nor proved by the State.

ARGUMENT

"Evaluating a statute's constitutionality is a question of law." *Hamilton v. Comm'r of Pub. Safety*, 600 N.W.2d 720, 722 (Minn. 1999). "Questions of law are subject to de novo review; therefore, [this Court] is not bound by the lower court's decision." *Id.* This Court has a duty to declare a statute unconstitutional when it "runs afoul of [a] constitutional mandate." *State v. Harris*, 667 N.W.2d 911, 920 (Minn. 2003).

I. SELECTIVE ENFORCEMENT OF THE HIF WOULD BE UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT BECAUSE IT WOULD IMPOSE A FEE ON PRODUCTS MADE BY PARTIES WHO HAVE RETAINED THEIR FIRST AMENDMENT RIGHTS WHILE EXEMPTING PARTIES WHO HAVE SURRENDERED THEIR FIRST AMENDMENT RIGHTS.

Selective enforcement of the HIF would violate the First Amendment of the United States Constitution and Article 1, Section 3 of the Minnesota Constitution[2] because it would impose a fee on products made by manufacturers who have retained their First Amendment rights while

[2] The First Amendment to the United States Constitution provides: "Congress shall make no law . . . abridging the freedom of speech . . . or the right of people . . . to petition the Government for redress of grievances." U.S. Const. amend. I. In addition, the Minnesota Constitution provides: "[A]ll persons may freely speak, write and publish their sentiments on all subjects." Minn. Const. art. I, § 3. The Minnesota Supreme Court has interpreted the scope of this provision to be same as the First Amendment to the United States Constitution. *See State v. Wicklund*, 589 N.W.2d 793, 799-801 (Minn. 1999).

exempting manufacturers who have surrendered their First Amendment rights.

A. The Settlement Agreement Imposes Restrictions on the Settling Defendants' First Amendment Rights Which the State Could Not Impose Directly.

The Settlement Agreement between the State and Settling Defendants imposes numerous restrictions on the Setting [sic] Defendants' constitutionally-protected First Amendment rights which the State could not impose directly. The Settlement Agreement limits the Setting [sic] Defendants' ability to oppose certain legislation impacting the tobacco industry, effectively relinquishing their First Amendment right to petition the government for a redress of grievances. The Settlement Agreement also restricts Setting [sic] Defendants' commercial speech rights, including a ban on advertising on billboards, buses, taxis and bus shelters, a ban on making payments to movie and television producers for product placement, and a ban on distributing promotional items, such as hats and t-shirts, bearing their products' brand names. Further, the Settlement Agreement limits the Setting [sic] Defendants' constitutionally protected right of access to the courts by restricting their ability to challenge the constitutionality and validity of certain laws regulating tobacco. It is undisputed that these restrictions on the rights to lobby, advertise and access the courts would be unconstitutional if imposed directly by the State.

It is well-settled that the lobbying restrictions of the sort contained in the Settlement Agreement are unconstitutional. These lobbying restrictions regulate pure political

speech, which is afforded the highest possible protection under the First Amendment. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 498 (1996) (suppression of political speech is justified only by an emergency). The right to lobby, which is part of the overall right to petition the government for a redress of grievances, "extends to all departments of the Government," *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972), and is considered "core" political speech protected by the First Amendment. *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961). Indeed, the United States Supreme Court has long "recognized this right to petition as one of the most precious of the liberties safeguarded by the Bill of Rights." *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 524 (2002) (internal quotation omitted). Thus, there is no doubt that, if the lobbying restrictions contained in the Settlement Agreement were imposed directly by the State, they would be unconstitutional.

Likewise, if imposed directly by the State, the commercial speech restrictions contained in the Settlement Agreement would be unconstitutional. In fact, in *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525 (2001), the United States Supreme Court held that advertising restrictions nearly identical to those contained in the Settlement Agreement violated the First Amendment. *Id.* at 554. The restrictions at issue in *Lorillard* forbade outdoor tobacco advertising within a 1,000-foot radius of a school or playground and prohibited indoor, point-of-sale advertising "lower than five feet from the floor of any retail establishment which is located within a one thousand foot radius of" any school or playground. *Id.* at 535-36. The Court ruled that the first restriction, which constituted

nearly a total ban on outdoor advertising in certain cities, was more extensive than necessary to serve the state's interest in curbing underage smoking. *Id.* at 561-66. The Court held that the second restriction also was unconstitutional, finding that the 5-foot limit did not advance the state's goal in preventing minors from using tobacco products, since "[n]ot all children are less than 5 feet tall, and those who are certainly have the ability to look up and take in their surroundings." *Id.* at 566.

Finally, the restrictions on access to the courts to challenge certain laws regulating tobacco contained in the Settlement Agreement would also be unconstitutional if imposed directly by the State. The right of access to the courts to challenge the constitutionality or validity of a law is a central aspect of the First Amendment's right to "petition the government for a redress of grievances." *Cal. Motor,* 404 U.S. at 510, 513. The Settlement Agreement restricts this access because the Settling Defendants agreed not to "challenge the enforceability or constitutionality of certain laws regarding cigarettes." App. 54.

B. Selective Enforcement of HIF Would Violate CITMA Members' Rights Under the First Amendment of the United States Constitution and Article I, Section 3 of the Minnesota Constitution.

Selective enforcement of the HIF would violate the First Amendment of the United States Constitution and Article 1, section 3 of the Minnesota constitution because it would effectively tax CITMA members' products based on their refusal to surrender their First Amendment rights to free speech, access the courts and petition the government for a redress of grievances. Selective enforcement

would impose the HIF Fee on products manufactured by parties who have refused to surrender their First Amendment rights, while exempting products made by parties who have relinquished their rights. Just as it would be unconstitutional for the State to directly impose the Settlement Agreement's restrictions on tobacco product makers' First Amendment rights, it is also unconstitutional to selectively enforce the HIF by imposing it on CITMA members' products because they have refused to surrender such rights while exempting the Settling Defendants' products because they relinquished such rights.

Selective enforcement of the HIF would also violate the First Amendment by taxing all products made by parties that have refused to surrender their First Amendment rights and exempting all products made by parties that have agreed to surrender their First Amendment rights. In this way, selective enforcement of the HIF would draw a facially discriminatory and unconstitutional distinction based on whether the tobacco manufacturer has waived its First Amendment rights. Accordingly, such selective enforcement would be unconstitutional because it would effectively condition the right of CITMA members to engage in advertising and lobbying protected by the First Amendment on the payment of the Fee on their products. *See Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue,* 460 U.S. 575, 586 n.9 (1983) ("By imposing the tax as a condition of engaging in protected activity, [the government] imposed a form of prior [unconstitutional] restraint on speech"); *Follett v. Town of McCormick,* 321 U.S. 573, 577 (1944) ("The exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment is as obnoxious . . . as the imposition of the censorship or a previous restraint.")

The United States Supreme Court has held that state taxing schemes that seek to limit taxpayers' freedom of speech or which punish taxpayers for engaging in speech protected by the First Amendment are unconstitutional. In *Speiser v. Randall,* 357 U.S. 513 (1958), the Supreme Court struck down a California tax law which exempted only those veterans who swore a loyalty oath. *Id.* at 518-19. The Court held that, just as a state could not constitutionally require veterans to take the loyalty oath, a state likewise could not tax only those veterans who refused to take the loyalty oath. *Id.* Allowing a state to do so would allow it to unconstitutionally punish veterans who retained their First Amendment rights and to seek to coerce those veterans into waiving their First Amendment rights. *Id.*

The United States Supreme Court has made clear that *Speiser* is not limited to the specific facts of that case. The Court has explained that *Speiser* stands for the broad proposition that the government "may not deny a benefit to a person on a basis that infringes his [or her] constitutionally protected interests-especially, his [or her] interest in freedom of speech." *Perry v. Sindermann,* 408 U.S. 593, 597 (1972). This is because if the government "could deny a benefit to a person because of his [or her] constitutionally protected speech or associations, his [or her] exercise of those freedoms would in effect be penalized and inhibited." *Perry,* 408 U.S. at 597. In other words, the government may not impose a penalty, such as a tax or fee, or withhold a benefit, such as an exemption from a tax or fee, in order to "'produce a result which it could not command directly.'" *Id.* (quoting *Speiser,* 357 U.S. at 526).

In *FCC v. League of Women Voters,* 468 U.S. 364 (1988), the Supreme Court applied these same principles

and struck down a federal law that conditioned the grant of federal funds on whether a television station agreed to refrain from editorializing. The Court reasoned that, because editorializing is a right protected by the First Amendment, the government could not condition funding on a station's decision to surrender that right. *Id.* at 400-02. To allow the government to condition the receipt of funds on a waiver of First Amendment rights would unconstitutionally allow the government to punish those broadcasters who retained their First Amendment rights. *Id.*; *see also Rosenberger v. Rectors & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (public university could not condition grant of funds on student group's waiver of its First Amendment right to publish religious periodical).

Further, in *Sherbert v. Verner,* 374 U.S. 398 (1963), the United States Supreme Court applied these principles and held that a state could not deny unemployment compensation benefits to the plaintiff when she refused to accept employment that would have required her to work on Saturdays in violation of her religious beliefs. *Id.* at 405-410. In doing so, the Court rejected the dissent's argument that the plaintiff was denied benefits "just as any other claimant would be denied benefits who was not 'available for work for personal reasons,' and that the "fact that these personal considerations sprang from her religious convictions was wholly without relevance" to the state's denial of benefits. *Id.* at 419-420 (Harlan, J. dissenting). The Court instead held that the statute as applied violated the First Amendment "even though the burden on" plaintiffs constitutional rights "may be characterized as being only indirect." *Id.* at 404. Similarly, the Court explained that a statute can violate the First Amendment regardless of whether the government actually intended to punish or

burden constitutional rights. *Id.* at 405 (laws that "operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms" are unconstitutional); *Minneapolis Star & Tribune,* 460 U.S. at 592 (no requirement that government have illicit intent); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.,* 502 U.S. 105, 117 (1991) (party challenging law under First Amendment "need adduce no evidence of improper censorial motive" to succeed).

Selective enforcement of the HIF would violate the above principles, and therefore would be unconstitutional. Indeed, the principle of *Speiser,* that the government may not condition on the surrender of First Amendment rights, compels a ruling that selective enforcement of the HIF would be unconstitutional because it would exempt from the HIF fee only those products made by manufacturers who have surrendered their First Amendment rights to advertise, petition the government, and access the courts. *See Speiser,* 357 U.S. at 518. As the Court explained in *Speiser,* "[t]o deny [a tax] exemption to [parties] who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech," and it is therefore unconstitutional. *Id.*; *see also Perry,* 408 U.S. at 597.

The United States Supreme Court has long held that laws, or the selective enforcement of them, can violate the First Amendment's free speech guarantees even when they "appear to be totally unrelated to protected liberties." *NAACP v. Alabama,* 357 U.S. 449, 461 (1958); *see also Sherbert,* 374 U.S. at 404 (statute violated First Amendment "even though the burden may be characterized as being only indirect"). In fact, it is well established that a statute can violate the First Amendment even if the law

does not reference speech. *See NAACP,* 357 U.S. at 461. Rather than requiring that a statute reference speech, the United States Supreme Court instead examines whether the law as applied has the effect of burdening or interfering with First Amendment rights. *See Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue,* 460 U.S. 575, 592 (1983) ("We have long recognized that even regulations aimed at proper government concerns can restrict unduly the exercise of rights protected by the First Amendment."). Accordingly, inadvertent or unintended infringements of First Amendment rights are just as unconstitutional as purposeful abridgements of these freedoms. *NAACP,* 357 U.S. at 461; *Minneapolis Star & Tribune,* 460 U.S. at 592; *Sherbert,* 374 U.S. at 404.

Indeed, in the context of challenges to state tax laws that discriminate among similarly situated parties based on their First Amendment rights (as selective enforcement of the HIF would), the United States Supreme Court has specifically held that "improper censorial motive" is *not* required. *Leathers v. Medlock,* 499 U.S. 439, 445 (1991) (citing *Minneapolis Star & Tribune,* 460 U.S. at 592). As the Court explained, the Minnesota tax law in *Minneapolis Star & Tribune* violated the First Amendment despite the fact that there was "no evidence of impermissible legislative motive in the case apart from the structure of the tax itself." *Leathers,* 499 U.S. at 445. Indeed, in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.,* 502 U.S. 105 (1991), the United States Supreme Court expressly *rejected* the government's argument that "discriminatory financial treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas." 502 U.S. at 177. The Court held the government's argument was "incorrect" because the

party challenging the application of a law under the First Amendment "need adduce no evidence of improper censorial motive" to succeed. *Id.* Thus, the improper burden on CITMA members' First Amendment rights imposed by selective enforcement of HIF is more than sufficient to establish that such selective enforcement would be unconstitutional.

II. SELECTIVE ENFORCEMENT OF THE HIF WOULD VIOLATE THE EQUAL PROTECTION CLAUSE AND UNIFORMITY CLAUSE.

Selective enforcement of the HIF would violate the Equal Protection Clause of the Fourteen [sic] Amendment to the United States Constitution and the Uniformity Clause of the Minnesota Constitution.[3] The "equal protection clause protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class." *Hillsborough v. Cromwell,* 326 U.S. 620, 623 (1946). "It is well established that a corporation is a 'person' within the meaning of the Fourteenth Amendment." *Metro. Life Ins. Co. v. Ward,* 470 U.S. 869, 881 n.9 (1985).

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[3] The Fourteenth Amendment to the United States Constitution provides: "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." Similar to the Equal Protection Clause, Article X, section 1 of the Minnesota Constitution, referred to as the Uniformity Provision, mandates that "[t]axes shall be uniform upon the same class of subjects." "It is established in Minnesota that the uniformity provision of the state constitution is no more restrictive upon the legislature's power to tax or classify than is the equal protection clause in the Fourteenth Amendment to the United States Constitution." *Westling v. County of Mille Lacs,* 581 N.W.2d 815, 820 (Minn. 1998). Thus, "[t]he same test is used for both analyses." *Id.*

A. Selective Enforcement of the HIF Violates the Equal Protection Clause and the Uniformity Clause Because It Would Discriminate Against Tobacco Manufacturers for Their Refusal to Surrender Fundamental Constitutional Rights.

Selective enforcement of the HIF would violate the Equal Protection clause and the Uniformity clause because it would burden fundamental rights by applying the HIF Fee to products made by manufacturers that have refused to surrender their First Amendment rights, while exempting products made by Setting [sic] Defendants who have relinquished such rights.

Contrary to the State's argument that rational basis review should apply, selective enforcement of the HIF on only those tobacco products made by non-settling manufacturers would be subject to strict scrutiny because it would discriminate against tobacco manufacturers who have refused to surrender their fundamental constitutional rights. The proper test to be applied to a fee or tax under the Equal Protection and Uniformity Clauses depends on whether the fee or tax is based on a suspect classification (such as race), or limits or burdens the exercise of the taxpayer's constitutional rights (such as freedom of speech). If the fee or tax is not imposed based on a suspect classification or does not limit or burden fundamental constitutional rights, it is generally evaluated under the rational basis test. *See Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue,* 460 U.S. 575, 582-83 (1983). However, if a tax or fee would limit or burden the exercise of a constitutional right, the statute must satisfy "strict scrutiny." *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 440 (1985); *Granville v. Minneapolis Pub. Sch.,*

668 N.W.2d 227, 230 (Minn. Ct. App. 2003). Under strict scrutiny, a statute's classifications "are constitutional only if they are narrowly tailored measures that further compelling government interests." *Adarand Contractors, Inc. v. Pena,* 515 U.S. 200, 227 (1995).

For example, in *Minneapolis Star & Tribune,* the Supreme Court applied strict scrutiny and struck down a Minnesota tax which unconstitutionally burdened First Amendment rights. 460 U.S. at 592-93. The case involved Minnesota's use tax on the cost of paper and ink products consumed in the production of periodic publications. The Court held that a "tax that burdens rights protected by the First Amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest." *Id.* at 582. The Court further held that the State's asserted interest in raising revenue – an interest "critical to any government" – was insufficient to justify the differential treatment because the State "could raise the revenue by taxing businesses generally" and thereby avoid a tax that restricts First Amendment rights. *Id.* at 586. Accordingly, the Court held the statute was unconstitutional. *Id.*

The analysis and holding in *Minneapolis Star & Tribune* apply to this case and compel the conclusion that selective enforcement of the HIF would be unconstitutional. As with the statute in *Minneapolis Star & Tribune,* selective enforcement of the HIF would be subject to strict scrutiny because it would burden CITMA members' First Amendment rights. Such selective enforcement would essentially tax CITMA members' and other manufacturers' products based on their refusal to relinquish their First Amendment rights, in contrast to Settling Defendants who have waived their First Amendment rights and whose products would be exempt from the HIF Fee. As with the

statute in *Minneapolis Star & Tribune,* this would fail the strict scrutiny test because it would not be narrowly tailored to further a compelling government interest.[4]

The State has never even attempted to argue that selective enforcement of the HIF would or could satisfy strict scrutiny. Thus, selective enforcement of the HIF would fail the strict scrutiny test, and therefore would be unconstitutional.

B. Selective Enforcement of the HIF Would Violate the Equal Protection Clause and Uniformity Clause Even Under Rational Basis Review Because It Would Draw a Fundamentally Unfair, Arbitrary and Capricious Distinction Without Serving Any Legitimate and Rational Purpose.

Even if the strict scrutiny test did not apply to the selective enforcement of the HIF, which it does, such selective enforcement would still violate the Equal Protection Clause and Uniformity Clause under the rational basis review urged by the State because selective enforcement would draw fundamentally unfair, arbitrary and

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[4] Unlike the Settling Defendants, which the State alleged committed fraud, falsely advertised their products and violated anti-trust laws while engaged in a "unified campaign of deceit and misrepresentation" to conceal information regarding the health effects of their products, the State has not alleged, and cannot establish, similar conduct on the part of CITMA members. Without engaging in culpable conduct, which has not been alleged by the State, CITMA members cannot lawfully be punished merely for selling tobacco products, which conduct is entirely lawful. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 138-39 (2000).

capricious distinctions without any legitimate or rational legislative purpose.

Minnesota courts apply a well established three-part rational basis test to determine whether a tax classification violates the Equal Protection Clause of the Fourteenth Amendment and the Minnesota Uniformity Clause: (1) the classification must not be "manifestly arbitrary or fanciful but must be genuine and substantial;" (2) the classification must be "genuine or relevant to the purpose of the law; that is, there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy;" and (3) "the purpose of the statute must be one that the state can legitimately attempt to achieve." *Miller Brewing Co. v. State,* 284 N.W.2d 353, 356 (Minn. 1979). Although this test is deferential, this Court has not hesitated to strike down statutes as unconstitutional if the distinctions drawn are arbitrary or irrational. *See, e.g., Minn. Cable Communications Ass'n v. Minn. Cable Communications Bd.,* 288 N.W.2d 721 (Minn. 1980). Selective enforcement of the HIF would fail this three-part test because the distinctions drawn would be arbitrary and irrational.[5]

First, selective enforcement of the HIF would create a classification that is "arbitrary and fanciful." Selective enforcement would impose the HIF Fee on tobacco manufacturers' products based solely on *who makes the product,* and not based on any legitimate criteria. Selective enforcement

[5] CITMA members do not challenge the State's ability to impose fees or taxes on tobacco products, so long as all tobacco product makers are treated equally. However, laws should not be selectively enforced against only certain manufacturers' products and exempt others when there is no reasonable and legitimate basis for the distinction.

of the HIF Fee would *not* be imposed based on the health effects of the tobacco products, how the products are made, how the products are sold, or any other *legitimate* basis to differentiate between the tobacco products subject to the HIF Fee and those that would be exempt. There is simply no evidence that non-settlement tobacco products are more responsible for health-related costs or youth smoking.

In fact, the State's own statistics show that the Settling Defendants' cigarettes are responsible for at least 88% of underage sales. *See* Minnesota Department of Health, *Results from the Minnesota Youth Tobacco Survey,* p. v (Dec. 2000).[6] Because youth overwhelmingly choose to smoke the Settling Defendants' brands of cigarettes rather than those made by non-settling manufacturers, this suggests non-settlement manufacturers are *less* responsible for youth smoking. It would be arbitrary and irrational for the State to apply the HIF exclusively to non-settlement cigarettes, which account for relatively few underage sales, while exempting cigarettes made by the Settling Defendants, which account for almost all underage sales. Because selective enforcement of the HIF would exempt the very brands of cigarettes that are responsible for the vast majority of underage sales, selective enforcement would not be rationally related to the statute's stated purpose of curbing underage smoking. *See McLaughlin v. Florida,* 379 U.S. 184, 190-91 (1964) (to survive scrutiny

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[6] *See also* Minnesota Department of Health, *Patterns of Smoking Among Minnesota's Young Adults, January 2004,* http://www.health.state.mn.us1divs/hpcd/tpc/YoungAdult2003Report.pdf (visited Mar. 2, 2006) (preferences for the Settling Defendants' brands "are established during middle school and high school," but such brand preferences tend to decrease with age).

under the Equal Protection Clause, distinctions drawn in a statute must be "reasonable in light of its purpose").

Also, because the non-settling manufacturers have never been sued by the State for false advertising, consumer fraud or any other unlawful conduct in selling their tobacco products, this suggests that non-settlement manufacturers are *less* responsible for the health-costs of smoking. Further, the non-settling manufacturers' cigarettes are already subject to the "Fee in Lieu of Settlement" which is imposed on only non-settlement manufacturers' products while exempting the Settling Defendants' products. Minn. Stat. § 297F.24. Accordingly, because the non-settling manufacturers are already subject to this selectively imposed fee, imposing an additional selectively enforced HIF Fee would be irrational and contrary to the legislature's expressed intent to treat all tobacco products equally under the HIF.

Second, the arbitrary classification created by selective enforcement of the HIF would not be relevant to the purpose of the HIF because there would be no "connection between the distinctive needs peculiar to the class and the prescribed remedy." *Miller Brewing Co.*, 284 N.W.2d at 356. Indeed, selective enforcement of the HIF would be *contrary to* the legislature's stated intent for the HIF. The HIF has two stated purposes: (1) recovering revenue for the health-related costs of tobacco products; and (2) reducing smoking, particularly youth smoking. However, if the HIF Fee is applied only to non-settling manufacturers' tobacco products, which comprise less than 10% of the market, the State will initially recover very little revenue, and that revenue will inevitably shrink as smokers switch to products sold by the Settling Defendants exempt from the HIF Fee.

Also, selective enforcement of the HIF would not serve the statute's purpose of reducing smoking, particularly by youth. Initially, imposing the fee on only 10% of the tobacco products sold in the state will not cause the price of all tobacco products to rise, but will simply drive smokers to choose products made by the Settling Defendants. Further, the State's own statistics show that youth smokers overwhelmingly choose tobacco products made by the Settling Defendants, so it will not deter youth smoking Moreover, to the extent youth smokers are more sensitive to price increases than adult smokers, this will drive more of those teens to choose the Settling Defendants' products.

Third, selective enforcement of the HIF would not serve a purpose that the State can "legitimately attempt to achieve." *Miller Brewing Co.,* 284 N.W.2d at 356. As shown above, the legitimate purposes of recovering health related costs and discouraging smoking, particularly by youths, would not be furthered in any manner through the selective enforcement of the HIF. Instead, only illegitimate purposes, such as punishing non-settling tobacco manufacturers without judicial process, would be served.

This Court has previously stuck down other arbitrary tax classifications similar to selective enforcement of the HIF as violating the Equal Protection Clause or Uniformity Clause. For example, in *National Tea Co. v. State,* 205 Minn. 443, 286 N.W. 360 (1939),[7] this Court held unconstitutional a

[7] This Court issued two opinions over two years in *National Tea.* First, in 1939, the Court ruled that a state statute imposing a sales tax which varied from .05% to .85% of a sale based on the merchant's volume was unconstitutional because it was arbitrary, unequal and discriminatory. 205 Minn. at 449, 286 N.W. at 363. Following remand from the United States Supreme Court, this Court clarified that the

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sales tax which imposed different rates of taxation on stores selling the same merchandise based solely on the merchant's sales volume. As this Court explained, the law taxed "different persons" at "different rates" for the "privilege of doing the same act." *Id.* at 361. Accordingly, the Court held that the tax was arbitrary, unfair, and unequal, and that it therefore violated the Uniformity Clause. *Id.*

Selective enforcement of the HIF would be indistinguishable from the tax struck down in *National Tea.* As in *National Tea,* such selective enforcement would impose a different tax on "different persons" for the "privilege of doing the same act," with "different" sellers being "taxed at different rates for performing the same acts." *Id.* at 361. There is no rational, legitimate difference between the tobacco products sold by the Settling Defendants and the products sold by non-settling manufacturers such as CITMA members. Both groups manufacture and sell essentially the same tobacco products. The only difference is that the Settling Defendants agreed to make annual payments to the State and to surrender their First Amendment rights pursuant to the Settlement Agreement to avoid liability for fraud, false advertising, and anti-trust violations. No such allegations have ever been made, let alone proven, by the State against any CITMA member.

Similarly, this Court struck down as unconstitutional a franchise fee from which six cable companies were exempted by the operation of federal law. *Minn. Cable Communications Ass'n v. Minn. Cable Communications Bd.,* 288 N.W.2d 721, 722-23 (Minn. 1980). The fee was

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sales tax violated the Uniformity Clause of the Minnesota Constitution. 208 Minn. 607, 608, 294 N.W. 230, 231 (1940).

"intended to be borne by all the companies in an 'equitable' manner," but because of the application of federal law, six companies were exempted from the fee, "reliev[ing]" these companies of "a burden imposed on the other" cable companies. *Id.* at 722. This Court held the fee unconstitutional under the rational basis test, explaining that the "legislature may legitimately seek to promote revenue-raising measures of the municipalities, but it should not do so by imposing on only some cable companies the costs of regulatory activities enjoined by all." *Id.* at 722-23.

Selective enforcement of the HIF would be indistinguishable from the selectively enforced cable franchise fee struck down by this Court in *Minnesota Cable Communications Ass'n*. The legislature intended the HIF to apply equally to all tobacco product manufacturers. However, if the HIF were to be selectively enforced, then approximately 90% of the tobacco product market would be exempted from the HIF Fee while only 10% of the tobacco products on the market would be subject to the HIF Fee. As in *Minnesota Cable Communications Ass'n,* such selective enforcement of a fee imposed "on only some" companies in an industry is unconstitutional. *See also In re Hamm,* 255 Minn. 64, 96 N.W.2d 649 (1959) (violation of uniformity clause for a tax assessor to appraise commercial properties at different rates, resulting in certain properties bearing a disproportionate share of the tax burden); *Minn. Linseed Oil Co. v. Palmer,* 20 Minn. 468, 476 (1874) ("[I]t would be clearly unconstitutional for the legislature to authorize the levy of a tax exclusively upon a particular block or portion of a division of the city to pay for an improvement to which all the property of such division should contribute.").

The United States Supreme Court has also held unconstitutional various tax laws that arbitrarily discriminated among similarly situated citizens. For example, in *Hooper v. Bernalillo County Assessor,* 472 U.S. 612 (1985), the Court struck down a New Mexico law granting a tax exemption for Vietnam War veterans that was limited to those who had moved to the state before a certain date prior to the passage of the statute. Similarly, in *Zobel v. Williams,* 457 U.S. 55 (1982), the Court held Alaska could not distribute mineral royalties to its residents based upon how long they had lived in the state. *See also Louisville Gas & Elec. Co. v. Coleman,* 277 U.S. 32 (1928) (invalidating state law imposing recording tax on all mortgages, but arbitrarily exempting mortgages that matured in five years); *Allegheny Pittsburgh Coal Co. v. County Comm'n,* 488 U.S. 336 (1989) (tax assessor's practices violated equal protection because certain properties received dramatically higher assessments than neighboring, comparable properties).

III. SELECTIVE ENFORCEMENT OF THE HIF WOULD VIOLATE THE MINNESOTA CONSTITUTION'S PROHIBITION AGAINST SPECIAL LEGISLATION.

Article 12, section 1 of the Minnesota Constitution expressly prohibits the enactment of "special legislation." This section provides:

> In all cases when a general law can be made applicable, a special law shall not be enacted . . . Whether a general law could have been made applicable in any case shall be judicially determined without regard to any legislative assertion on that subject. *The legislature shall pass no local or*

> *special law . . . granting to any private corporation, association, or individual any special or exclusive privilege, immunity or franchise whatever . . .*"

Minn. Const. art. XII, § 1 (emphases added).

This constitutional provision requires that a law's classification "be based upon substantial distinctions, which make one class substantially different, in a real sense, from another." *In re Tveten,* 402 N.W.2d 551, 558 (Minn. 1987). Accordingly, "[a] law will be considered to be general if the class to which it applies justifies a statute particular to the class in the matters addressed in the law, but if the classification is so patently arbitrary as to demonstrate constitutional evasion, the courts will void the enactment." *Id.* (citing *State ex rel Flaten v. Indep. Sch. Dist. of Granite Falls,* 174 N.W. 414 (Minn. 1919)); *see also Wm. Warnock Co. v. H.D. Hudson Mfg. Co.,* 200 Minn. 196, 273 N.W. 710 (1937) (statute that excluded a class of corporations in existence for more than one year from the Business Corporation Act was unconstitutional).

In *Tveten,* the Minnesota Supreme Court addressed whether the prohibition on special legislation was violated by a statute that provided a limitless exemption in bankruptcy for annuities and life insurance policy benefits if such annuities or policies were provided by a fraternal benefits society, but provided only a limited exemption for policies and annuities issued by for-profit insurance companies. *Id.* at 559-60. Thus, although the insurance policies or annuities were identical, the treatment under the statute was determined *solely* on the basis of *who* issued the policy or annuity. *Id.* at 559. The Court held that this justification provided "an insufficient rational basis for differentiating between similarly placed debtors and their creditors." *Id.* Accordingly, the Court held the

statute violated the constitutional provision against special legislation. *Id.*; *see also Wm. Warnock Co.*, 273 N.W. at 713 (statute that distinguished "between corporations depending upon whether they were organized for the maximum period allowed by law, or for two or more years less" was "arbitrary and fanciful," and therefore was unconstitutional special legislation).

In this case, selective enforcement of the HIF would be identical in all relevant aspects to the unconstitutional law in *Tveten*. As in *Tveten*, such selective enforcement would treat identical products in substantially different ways based *solely* on *who* manufactures the product, rather than based on any legitimate or rational distinction involving the products themselves. In this case, the distinction would be even more irrational than in *Tveten* because the selective enforcement would exempt from the HIF Fee products made by companies who were sued by the State for their wrongdoing (Settling Defendants) while imposing the HIF Fee on products made by companies that have never been accused of wrongdoing, and whose products are already subject to a fee for which the Settling Defendants' products are exempt. *See* Minn. Stat. § 297F.24.

IV. SELECTIVE ENFORCEMENT OF THE HIF WOULD TRANSFORM THE STATUTE INTO AN UNCONSTITUTIONAL BILL OF ATTAINDER.

Selective enforcement of the HIF would transform the statute into an unconstitutional Bill of Attainder[8] because

[8] Article I, Section 11 of the United States Constitution provides that: "No state shall . . . pass any Bill of Attainder." Similarly, the

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it would penalize CITMA members and other non-settling manufacturers for purported conduct which has never been alleged or proved by the State in any court.

A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468 (1977). The prohibition against bills of attainder forbids state legislatures from assuming judicial functions or conducting trials. *United States v. Brown*, 381 U.S. 437, 442 (1965). This provision was included in the Constitution "not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply – trial by legislature." *Id.*

A law is an unconstitutional bill of attainder if it: (1) applies to designated individuals or groups; and (2) imposes punishment. *Nixon*, 433 U.S. at 474. Selective enforcement of the HIF would transform the law into an unconstitutional bill of attainder under this two-part analysis.

First, selective enforcement of the HIF would result in the HIF Fee applying only to designated entities – tobacco product makers who did not participate in the Settlement Agreement and surrender their First Amendment rights. *See Brown*, 381 U.S. at 450 (law that did not "set forth a

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Minnesota Constitution provides that "no bill of attainder . . . shall be passed." Minn. Const. art. I, § 11. In determining whether a statute violates the Minnesota Constitution's or the United States Constitution's prohibitions against bills of attainder, this Court has applied the same analysis. *See Reserve Mining Co. v. State*, 310 N.W. 487, 490-92 (Minn. 1981).

generally applicable rule . . . and leave to courts and juries the job of deciding what persons . . . possess the specified characteristics" violated the Bill of Attainder Clause). The number of such manufacturers is not relevant to the analysis. A bill of attainder may apply to "relatively large groups of people, sometimes by description rather than name." *Id.* at 461.

Second, selective enforcement of the HIF would inflict punishment on CITMA members and other non-settling manufacturers. In this case, while nominally designated as a "fee," selective enforcement of the HIF would, in effect, act as a fine that punishes CITMA members and non-settling manufacturers for their purported conduct – conduct similar to that alleged against the Settling Defendants, but neither asserted nor proved with respect to CITMA members. *See Carmichael v. S. Coal & Coke Co.,* 301 U.S. 495, 508 (1937) ("The particular name which a . . . legislature may give to a money payment commanded by its statute is not controlling here when its constitutionality is in question."). As Chief Justice John Marshall famously stated, "the power to tax involves the power to destroy." *M'Culloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 431 (1819). The State sued the Settling Defendants based on their past fraudulent and unlawful conduct, and the Settling Defendants settled with the State to avoid liability for such conduct, including potential punitive damages.

Any claim that selective enforcement of the HIF would not violate the Bill of Attainder Clause because it would apply only to future activities (the prospective sale of tobacco products) should be rejected as being at odds with the Constitution. The United States Supreme Court has repeatedly held that, "[w]hen past activity serves as 'a point of reference for the ascertainment of particular

persons ineluctably designated by the legislature' for punishment, the Act may be an attainder." *Selective Sew. Sys. v. Minn. Pub. Interest Research Group,* 468 U.S. 841, 847 (1984) (quoting *Cummings v. Missouri,* 71 U.S. (4 Wall.) 277, 324 (1866)). CITMA members' and other non-settling manufacturers' past activity – failing to relinquish their First Amendment rights and make annual settlement payments to the State – would serve as the *only* basis for the Fee. The fact that CITMA members would have the "option" of "voluntarily" terminating their sales of tobacco products to "avoid" the HIF Fee would have no constitutional significance. If it did, governments could render every law immune from scrutiny under the Bill of Attainder Clause merely by including a provision allowing parties to "voluntarily" agree to cease their lawful conduct in the future to avoid the punishment inflicted by the law. Of course, this is not the law. *See Brown,* 381 U.S. at 449-52, 458-59 (holding unconstitutional as a bill of attainder a federal law that prospectively denied members of communist party from holding a leadership position in a union even though the individuals could have voluntarily sought a different position); *United States v. Lovett,* 328 U.S. 303, 315-16 (1946) (holding unconstitutional as a bill of attainder a federal law that prospectively denied certain government employment to certain individuals even though the individuals could have voluntarily sought different employment); *Cummings v. Missouri,* 71 U.S. (4 Wall.) 277 (1866) (holding unconstitutional as a bill of attainder a state law requiring persons to take a loyalty oath as a prerequisite to continuing to practice a profession, even though the individuals could have voluntarily ceased practicing their profession in Missouri); *Nixon,* 433 U.S. at 476 n.40 ("[P]unishment is not restricted purely to retribution for past events, but may include inflicting deprivations on some

blameworthy or tainted individual in order to prevent his future misconduct.") (citing *Brown,* 381 U.S. at 458-59).

CONCLUSION

For the above-stated reasons, CITMA respectfully requests that this Court affirm the District Court's ruling enjoining the HIF against all tobacco products because selective enforcement of the HIF would be unconstitutional.

Respectfully submitted,

Dated: March 2, 2006 WINTHROP & WEINSTINE, P.A.

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CERTIFICATE OF COMPLIANCE

Pursuant to Minnesota Rule of Civil Appellate Procedure 132.01 subd. 3, the undersigned hereby certifies, as counsel for Respondent-Intervenor Council of Independent Tobacco Manufacturers of America, that this brief complies with the type-volume limitation as there are 9,631 words of proportional space type in this brief. This brief was prepared using Ms Word 2000.

Dated: March 2, 2006 WINTHROP & WEINSTINE, P.A.

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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

The State of Minnesota, By Hubert H. Humphrey III, its Attorney General, and Blue Cross and Blue Shield of Minnesota, Plaintiffs, vs. Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, B.A.T. Industries P.L.C., British-American Tobacco Company Limited, BAT (U.K. & Export) Limited, Lorillard Tobacco Company, The American Tobacco Company, Liggett Group, Inc., The Council for Tobacco Research-U.S.A., Inc., and The Tobacco Institute, Inc., Defendants.	Case Type: Other Civil Court File No. C1-94-8565 (Judge Michael F. Fetsch) **INTERVENOR COUNCIL OF INDEPENDENT TOBACCO MANUFACTURERS OF AMERICA'S MEMORANDUM OF LAW IN OPPOSITION TO SETTLING DEFENDANTS' MOTION TO ENFORCE SETTLEMENT AGREEMENT**

I. INTRODUCTION

The Council of Independent Tobacco Manufacturers of America ("CITMA") submits this Memorandum of Law in Opposition to the relief requested by Settling Defendants in their Motion to Enforce Settlement Agreement. Settling

Defendants request that this Court order the State to selectively enforce the 2005 Tobacco Health Impact Fee ("2005 Tobacco Fee") by exempting the Settling Defendants' tobacco products from the Fee while enforcing the Fee against all other tobacco products, including those made by CITMA members. This Court should reject Settling Defendants' request because such selective enforcement of the 2005 Tobacco Fee would violate CITMA members' rights under the Minnesota and United States constitutions. Thus, this Court should either deny Settling Defendants' motion or, if it grants the motion, this Court should enjoin the State from enforcing the 2005 Tobacco Fee against all tobacco products.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The State Sued the Settling Defendants to Recover Damages for Harm Caused by the Settling Defendants' Fraudulent and Unlawful Conduct

On August 17, 1994, the above captioned action (hereafter the "State Tobacco Lawsuit") was commenced on behalf of the State, by then-Attorney General Hubert H. Humphrey III, against the named defendants. In the State Tobacco Lawsuit, the State asserted claims for monetary, equitable and injunctive relief, alleging that the defendants "knew for decades from their own internal studies that their products are deadly and addictive," yet engaged in a "unified campaign of deceit and misrepresentation" in an effort to conceal this information. *See* Second Amended Complaint, attached as Exhibit B to Affidavit of Edward B. Magarian. The State specifically singled out Phillip Morris, for suppressing independent research on the health effects of smoking; Liggett, for deciding not to

market safer cigarettes; R.J. Reynolds, for marketing to children and concealing research on smoking related diseases; and Brown & Williamson, for suppressing information regarding the addictive nature of nicotine and the correlation between smoking and cancer rates. *Id.* The State asserted claims for, among other things, deceptive trade practices, false advertising, and consumer fraud, and sought punitive damages for Settling Defendants' "willful indifference to the rights and safety of others." *Id.* The State did not sue CITMA or any of its members.

B. The Settling Defendants Surrendered Certain of Their Fundamental First Amendment Rights in the Settlement of the State Tobacco Lawsuit

The State settled the State Tobacco Lawsuit with the "big four" tobacco companies, Philip Morris, R.J. Reynolds, Brown & Williamson and Lorillard (the "Settling Defendants"), on or about May 12, 1998. *See* Settlement Agreement, attached as Exhibit A to Affidavit of Edward B. Magarian. This Court also entered a Consent Judgment regarding the settlement of the State Tobacco Lawsuit. *See* Consent Judgment, attached as Exhibit C to Affidavit of Edward B. Magarian. As part of the Settlement Agreement, the Settling Defendants agreed to pay the State and Blue Cross and Blue Shield of Minnesota, the other plaintiff in the State Tobacco Lawsuit, over $6.6 billion, with each Settling Defendant's share in proportion to its United States market share. Settlement Agreement at 7-14, § II.

Importantly, the Settling Defendants also agreed to numerous restrictions on their constitutionally protected rights to freedom of speech and to petition the government for a redress of grievances, including the right lobby the

government and to challenge the constitutionality of certain laws regarding tobacco products. Settlement Agreement at 18-22, § W. These restrictions on constitutional rights also included advertising restrictions far more onerous than the State could constitutionally impose on tobacco product manufacturers, such as removing all tobacco billboards and eliminating all tobacco ads on buses, taxis and bus shelters, ceasing payments to movie and television producers and ceasing distribution of promotional items, such as hats and t-shirts, bearing their products' brand names. *Id.* The Settling Defendants also promised not to oppose certain legislation impacting the tobacco industry and to relinquish their rights to challenge the constitutionality of certain laws regarding tobacco products. *Id.* Thus, in the Settlement Agreement, the Settling Defendants relinquished and agreed not to exercise many of their fundamental constitutional rights, including their right to freedom of speech and their right to petition the government for a redress of grievances as guaranteed by the First Amendment to the United States Constitution and Article I, Section 3 of the Minnesota Constitution.

C. The State Enacts the 2005 Tobacco Fee on All Tobacco Products

Effective August 1, 2005, the State enacted the "Tobacco Health Impact Fee" (the "2005 Tobacco Fee") to be collected from all "cigarette distributors and tobacco product distributors." *See* CITMA Notice of Intervention, Ex. 2.[1] The 2005 Tobacco Fee is to be imposed on all

[1] The Governor signed the 2005 Tobacco Fee as part of Article 4 of the State's Omnibus Health and Human Services Bill, H.R. 139, on July

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specified tobacco products in Minnesota regardless of who manufactures or sells the tobacco products. *Id.* The 2005 Tobacco Fee's stated purpose is "to recover for the state health costs related to or caused by tobacco use and to reduce tobacco use, particularly by youths." *Id.* A distributor of tobacco products "must pay the fee at the same time and in the same manner as provided for payment of tax under chapter 297F," which governs tobacco excise taxes. *Id.* The 2005 Tobacco Fee is to be administered as provided by the provisions in chapters 270C and 297F, which govern administration of excise taxes on tobacco products. *Id.* Accordingly, for all practical purposes, the 2005 Tobacco Fee imposes a tax on all tobacco products sold in Minnesota.

D. Settling Defendants Seek Selective Enforcement of the 2005 Tobacco Fee

On or about August 26, 2005, Settling Defendants brought their Motion to Enforce Settlement Agreement in this action. *See* Settling Defendants' Motion to Enforce Settlement Agreement. The Settling Defendants' motion specifically requests that this Court exempt Settling Defendants' tobacco products from the 2005 Tobacco Fee while allowing the State to continue to collect the 2005 Tobacco Fee from distributors selling tobacco products made by persons other than Settling Defendants, including CITMA members. *Id.* Thus, the Settling Defendants request that this Court order the State to selectively enforce the 2005 Tobacco Fee by imposing the Fee on only those tobacco products that are made by manufacturers

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14, 2005, with an effective date of August 1, 2005. Settling Defendants' Motion.

who, like CITMA members, have refused to relinquish their fundamental constitutional rights, while exempting the Settling Defendants' own products.

E. CITMA Does Not Want the 2005 Tobacco Fee to be Selectively Enforced

Intervenor CITMA, a Virginia non-stock corporation, is an association of small, independent tobacco manufacturers located throughout the United States. *See* CITMA Notice of Intervention. No CITMA members were parties to the State Tobacco Lawsuit, or the settlement thereof, and no CITMA members agreed to surrender any of their constitutional rights as part of any settlement with the State. *Id.* No CITMA members want to relinquish their First Amendment rights in the manner set forth in the settlement of the State Tobacco Lawsuit. *Id.* No CITMA members have ever been accused of the conduct alleged against the Settling Defendants in the State Tobacco Lawsuit. *Id.* The tobacco products manufactured by CITMA members are not fundamentally different from the tobacco products manufactured by the Settling Defendants. *Id.*

CITMA members do not want the 2005 Tobacco Fee to be selectively enforced against their products while the Settling Defendants' products are exempt. *Id.* Selective enforcement of 2005 Tobacco Fee against only those tobacco products manufactured by persons other than the Settling Defendants would substantially harm CITMA and its members by causing their tobacco products to be significantly more expensive than the Settling Defendants' essentially identical tobacco products. *Id.*

III. ARGUMENT

Selective enforcement of the 2005 Tobacco Fee on only those tobacco products made by parties other than Settling Defendants would be unconstitutional and unfair because imposition of the Fee would be contingent on whether the tobacco product manufacturer had surrendered its First Amendment rights. The Fee would be imposed on those products made by manufacturers who, like CITMA members, have refused to relinquish their fundamental First Amendment rights to freedom of speech, petition the government, and access the courts, but the Fee would not be applied against products made by the Settling Defendants – manufacturers who have agreed to surrender these rights. Such selective enforcement would therefore violate several provisions of the United States and Minnesota Constitutions because it would draw explicit distinctions and discriminate based on the exercise of First Amendment rights.

First, selective enforcement of the 2005 Tobacco Fee would violate the First Amendment because it would punish CITMA members and other non-settlement tobacco product manufacturers who refuse to surrender their First Amendment rights by subjecting their products to the 2005 Tobacco Fee (which acts as a tax) while exempting the products made by the Settling Defendants who have waived their rights. Second, selective enforcement of the 2005 Tobacco Fee would violate the Equal Protection Clause of the United States Constitution and the Uniformity Clause of the Minnesota Constitution because it would discriminate against CITMA members and other non-settling tobacco product manufacturers by subjecting their products to the Fee based on their refusal to surrender their First Amendment rights while exempting products

made by the Settling Defendants who have surrendered their rights. Third, selective enforcement of the 2005 Tobacco Fee would constitute unconstitutional special legislation prohibited by Article 12, Section 1 of the Minnesota Constitution. Finally, selective enforcement of the 2005 Tobacco Fee would constitute an unconstitutional Bill of Attainder because it would penalize CITMA members and other non-settling manufacturers for purported conduct that has neither been alleged nor proved by the State.

A. Selective Enforcement of the 2005 Tobacco Fee Would be Unconstitutional Under the First Amendment of the United States Constitution and Article 1, Section 3 of the Minnesota Constitution

Selective enforcement of the 2005 Tobacco Fee would violate the First Amendment of the United States Constitution and Article 1, Section 3 of the Minnesota Constitution[2] because it would impose a fee on products based on whether the manufacturer has surrendered its First Amendment rights.

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[2] The First Amendment to the United States Constitution provides: "Congress shall make no law . . . abridging the freedom of speech . . . or the right of people . . . to petition the Government for redress of grievances." U.S. Const. amend. I. In addition, the Minnesota Constitution provides: "[A]ll persons may freely speak, write and publish their sentiments on all subjects." Minn. Const. art. I, § 3. The Minnesota Supreme Court has interpreted the scope of this provision to be same as the First Amendment to the United States Constitution. *See State v. Wicklund*, 589 N.W.2d 793, 799-801 (Minn. 1999).

1. The Settling Defendants Surrendered Fundamental First Amendment Rights in the Settlement of the State Tobacco Lawsuit Which the State Could Not Restrict Directly

The Settlement Agreement between the State and the Settling Defendants imposes numerous restrictions on the Setting [sic] Defendants' constitutionally-protected First Amendment rights. The Settlement Agreement limits the Setting [sic] Defendants' ability to oppose certain legislation impacting the tobacco industry, effectively relinquishing their constitutional right to petition the government. The Settlement Agreement also restricts Setting [sic] Defendants' commercial speech rights, including a ban on advertising on billboards, buses, taxis and bus shelters, a ban on making payments to movie and television producers for product placement, and a ban on distributing promotional items, such as hats and t-shirts, bearing their products' brand names. Further, the Settlement Agreement limits the Setting [sic] Defendants' constitutionally protected right of access to the courts by restricting their ability to challenge the constitutionality and validity of certain laws regulating tobacco. These restrictions on the rights to lobby, advertise and access the courts would be unconstitutional if imposed directly by the State.

It is well-settled that lobbying restrictions of the sort contained in the Settlement Agreement are unconstitutional. These lobbying restrictions regulate pure political speech, which is afforded the highest possible protection under the First Amendment. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 498 (1996) (suppression of political speech is justified only by an emergency). The right to lobby, which is part of the overall right to petition the

government for a redress of grievances, "extends to all departments of the Government," *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972), and is considered "core" political speech protected by the First Amendment. *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961). Indeed, the United States Supreme Court has long "recognized this right to petition as one of the most precious of the liberties safeguarded by the Bill of Rights." *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 524 (2002) (internal quotation omitted). Thus, there is no doubt that, if the lobbying restrictions contained in the Settlement Agreement were imposed directly by the State, they would be unconstitutional.

Likewise, if imposed directly by the State, the commercial speech restrictions contained in the Settlement Agreement would be unconstitutional. In fact, in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), the United States Supreme Court held that advertising restrictions nearly identical to those contained in the Settlement Agreement violated the First Amendment. *Id.* at 554. The restrictions at issue in *Lorillard* forbade outdoor tobacco advertising within a 1,000-foot radius of a school or playground and prohibited indoor, point-of-sale advertising "lower than five feet from the floor of any retail establishment which is located within a one thousand foot radius of" any school or playground. *Id.* at 535-36. The Court ruled that the first restriction, which constituted nearly a total ban on outdoor advertising in certain cities, was more extensive than necessary to serve the state's interest in curbing underage smoking. *Id.* at 561-66. The Court held that the second restriction also was unconstitutional, finding that the 5-foot limit did not advance the state's goal in preventing minors from using tobacco

products, since "[n]ot all children are less than 5 feet tall, and those who are certainly have the ability to look up and take in their surroundings." *Id.* at 566.

The restrictions on access to the courts to challenge certain laws regulating tobacco contained in the Settlement Agreement would also be unconstitutional if imposed directly by the State. The right of access to the courts to challenge the constitutionality or validity of a law is a central aspect of the First Amendment's right to "petition the government for a redress of grievances." *Cal. Motor*, 404 U.S. at 510, 513. The Settlement Agreement restricts this access because the Settling Defendants agreed not to "challenge the enforceability or constitutionality of certain laws regarding cigarettes." Settlement Agreement at 18, § IV.A.2.

In sum, the restrictions on lobbying, commercial speech, and access to the courts contained in the Settlement Agreement would be unconstitutional if imposed directly by the State on tobacco manufacturers.

2. Selective Enforcement of the 2005 Tobacco Fee would Violate CITMA Members' Rights Under the First Amendment of the United States Constitution and Article 1, Section 3 of the Minnesota Constitution

Selective enforcement of the 2005 Tobacco Fee would violate the First Amendment of the United States Constitution and Article 1, section 3 of the Minnesota constitution because it would effectively tax CITMA members' products based on their refusal to surrender their fundamental rights to free speech, access the courts and petition

the government for a redress of grievances. Selective enforcement would impose the Fee on those products manufactured by parties who have refused to surrender their First Amendment rights, while exempting products made by parties who have relinquished their rights. Just as it would be unconstitutional for the State to directly impose the Settlement Agreement's restrictions on tobacco product makers' First Amendment rights, it is also unconstitutional to selectively enforce the 2005 Tobacco Fee by imposing it on CITMA members' products because they have refused to surrender such rights while exempting the Settling Defendants' products because they relinquished such rights.

Selective enforcement of the 2005 Tobacco Fee would violate the First Amendment by taxing all products made by parties that have refused to surrender their First Amendment rights and exempting all products made by parties that have agreed to surrender their First Amendment rights. In this way, it would draw a facially discriminatory and unconstitutional distinction based on whether the tobacco manufacturer has waived its First Amendment rights. Accordingly, such selective enforcement would be unconstitutional because it would effectively condition the right of CITMA members to engage in advertising and lobbying protected by the First Amendment on the payment of the Fee on their products. *See Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 586 n.9 (1983) ("By imposing the tax as a condition of engaging in protected activity, [the government] imposed a form of prior [unconstitutional] restraint on speech"); *Follett v. Town of McCormick*, 321 U.S. 573, 577 (1944) ("The exaction of a tax as a condition to the exercise of the great

liberties guaranteed by the First Amendment is as obnoxious . . . as the imposition of the censorship or a previous restraint.")

The United States Supreme Court has held that these types of state taxing schemes that seek to limit taxpayers' freedom of speech or to punish taxpayers for engaging in speech protected by the First Amendment are unconstitutional. In *Speiser v. Randall*, 357 U.S. 513 (1958), the Supreme Court struck down a California tax law which exempted only those veterans who swore a loyalty oath. *Id.* at 518-19. The Court held that, just as a state could not constitutionally require veterans to take the loyalty oath, a state likewise could not tax only those veterans who refused to take the loyalty oath. *Id.* Allowing a state to do so would allow it to unconstitutionally punish veterans who retained their First Amendment rights and to seek to coerce those veterans into waiving their First Amendment rights. *Id.*

The United States Supreme Court has made clear that *Speiser* is not limited to the specific facts of that case. The Court has explained that *Speiser* stands for the proposition that the government "may not deny a benefit to a person on a basis that infringes his [or her] constitutionally protected interests – especially, his [or her] interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). This is because if the government "could deny a benefit to a person because of his [or her] constitutionally protected speech or associations, his [or her] exercise of those freedoms would in effect be penalized and inhibited." *Id.* In other words, the government may not impose a penalty, such as a tax or fee, or withhold a benefit, such as a tax exemption, to "'produce a result

which it could not command directly.'" *Id.* (quoting *Speiser*, 357 U.S. at 526).

In *FCC v. League of Women Voters*, 468 U.S. 364 (1988), the Supreme Court applied these same principles and struck down a federal law that conditioned the grant of federal funds on whether a television station agreed to refrain from editorializing. The Court reasoned that, because editorializing is a right protected by the First Amendment, the government could not condition funding on a station's decision to surrender that right. *Id.* at 400-02. To allow the government to condition the receipt of funds on a waiver of First Amendment rights would unconstitutionally allow the government to punish those broadcasters who retained their First Amendment rights and coerce them into waiving their First Amendment rights. *Id.*; *see also Rosenberger v. Rectors & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (public university could not condition grant of funds on student group's waiver of its First Amendment right to publish religious periodical).

Further, in *Sherbert v. Verner*, 374 U.S. 398 (1963), the United States Supreme Court applied these principles and held that a state could not deny unemployment compensation benefits to the plaintiff when she refused to accept employment that would have required her to work on Saturdays in violation of her religious beliefs. 374 U.S. at 405-410. In doing so, the Court rejected the dissent's argument that the plaintiff was denied benefits "just as any other claimant would be denied benefits who was not 'available for work for personal reasons,'" and that the "fact that these personal considerations sprang from her religious convictions was wholly without relevance" to the state's denial of benefits. *Id.* at 419-420 (Harlan, J. dissenting). The Court instead held that the statute as

applied violated the First Amendment "even though the burden on" plaintiff's constitutional rights "may be characterized as being only indirect." *Id.* at 404. Similarly, the Court explained that a statute can violate the First Amendment regardless of whether the government actually intended to punish or burden constitutional rights. *Id.* at 405 (laws that "operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms" are unconstitutional); *Minneapolis Star & Tribune*, 460 U.S. at 592 (no requirement that government have illicit intent); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991) (party challenging law under First Amendment "need adduce no evidence of improper censorial motive" to succeed).

Selective enforcement of the 2005 Tobacco Fee would violate the above principles and would be unconstitutional. Indeed, the principle of *Speiser*, that the government may not condition a tax exemption on the surrender of First Amendment rights, compels a ruling that selective enforcement of the 2005 Tobacco Fee would be unconstitutional because it would exempt from taxation only those products made by manufacturers who have surrendered their First Amendment rights to advertise, petition the government, and access the courts. *See Speiser*, 357 U.S. at 518. As the Court explained in *Speiser*, "[t]o deny [a tax] exemption to [parties] who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech," and it is therefore unconstitutional. *Id.*; *see also Perry*, 408 U.S. at 597.

The United States Supreme Court has long held that laws, or the selective enforcement of them, can violate the First Amendment's free speech guarantees even when they

"appear to be totally unrelated to protected liberties." *NAACP v. Alabama*, 357 U.S. 449, 461 (1958); *see also Sherbert*, 374 U.S. at 404 (statute violated First Amendment "even though the burden may be characterized as being only indirect"). Accordingly, inadvertent or unintended infringements of First Amendment rights are just as unconstitutional as purposeful abridgements of these freedoms. *Id.*

Indeed, in the context of challenges to state tax laws that discriminate among similarly situated parties based on their First Amendment rights (as selective enforcement of the 2005 Tobacco Fee would), the United States Supreme Court has specifically held that "improper censorial motive" is *not* required. *Leathers v. Medlock*, 499 U.S. 439, 445 (1991) (citing *Minneapolis Star & Tribune*, 460 U.S. at 592). As the Court explained in a subsequent case, the Minnesota state tax law in *Minneapolis Star & Tribune* violated the First Amendment despite the fact that there was "no evidence of impermissible legislative motive in the case apart from the structure of the tax itself." *Leathers*, 499 U.S. at 445. Thus, the improper burden on CITMA members' First Amendment rights imposed by selective enforcement of the 2005 Tobacco Fee is more than sufficient to establish that such selective enforcement would be unconstitutional. *Id.*

B. Selective Enforcement of the 2005 Tobacco Fee Would Violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and the Uniformity Clause of the Minnesota Constitution

Selective Enforcement of the 2005 Tobacco Fee would violate the Equal Protection Clause of the Fourteenth

Amendment to the United States Constitution[3] and the Uniformity Clause of the Minnesota Constitution[4] because it would discriminate against CITMA members and other non-settling manufacturers based on their refusal to surrender their fundamental constitutional rights. The "equal protection clause protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class." *Hillsborough v. Cromwell*, 326 U.S. 620, 623 (1946). Selective enforcement of the 2005 Tobacco Fee would violate equal protection because it would burden fundamental rights by applying the Fee to products made by manufacturers that have refused to surrender their First Amendment rights, while exempting products made by Setting [sic] Defendants who have relinquished such rights.

The proper test to be applied to a fee or tax under the Equal Protection Clause, and therefore the Uniformity Clause as well, depends on whether the fee or tax is based on a suspect classification (such as race), or seeks to limit or burden the exercise of the taxpayer's constitutional

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[3] The Fourteenth Amendment to the United States Constitution provides: "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." "It is well established that a corporation is a 'person' within the meaning of the Fourteenth Amendment." *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 881 n.9 (1985).

[4] Similar to the Equal Protection Clause, Article X, section 1 of the Minnesota Constitution, referred to as the Uniformity Provision, mandates that "[t]axes shall be uniform upon the same class of subjects." "It is established in Minnesota that the uniformity provision of the state constitution is no more restrictive upon the legislature's power to tax or classify than is the equal protection clause in the Fourteenth Amendment to the United States Constitution." *Westling v. County of Mille Lacs*, 581 N.W.2d 815, 820 (Minn. 1998). Thus, "[t]he same test is used for both analyses." *Id.*

rights (such as freedom of speech). If the fee or tax is not imposed based on a suspect classification or does not limit or burden fundamental constitutional rights, it is generally evaluated under the rational basis test. *See Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 582-83 (1983). However, if a tax or fee would limit or burden the exercise of a constitutional right, the statute must "satisfy strict scrutiny." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *Granville v. Minneapolis Pub. Sch.*, 668 N.W.2d 227, 230 (Minn. Ct. App. 2003). Under strict scrutiny, a statute's classifications "are constitutional only if they are narrowly tailored measures that further compelling government interests." *Adarand Contractors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

For example, in *Minneapolis Star & Tribune*, the Supreme Court applied strict scrutiny and struck down a Minnesota state tax which unconstitutionally burdened First Amendment rights. 460 U.S. at 592-93. The case involved Minnesota's use tax on the cost of paper and ink products consumed in the production of periodic publications. The Court held that a "tax that burdens rights protected by the First Amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest." *Id.* at 582. The Court further held that the State's asserted interest in raising revenue – an interest "critical to any government" was insufficient to justify the differential treatment because the State "could raise the revenue by taxing businesses generally" and thereby avoid a tax that restricts First Amendment rights. *Id.* at 586. Accordingly, the Court held the statute was unconstitutional. *Id.*

The analysis and holding in *Minneapolis Star & Tribune* apply to this case and compel the conclusion that selective enforcement of the 2005 Tobacco Fee would be unconstitutional. As with the statute in *Minneapolis Star & Tribune*, selective enforcement of the 2005 Tobacco Fee would be subject to strict scrutiny because it would burden CITMA members' First Amendment rights. Such selective enforcement would essentially tax CITMA members' and other manufacturers' products based on their refusal to relinquish their First Amendment rights, in contrast to Settling Defendants who have waived their First Amendment rights and whose products are exempt from the Fee. As with the statute in *Minneapolis Star & Tribune*, this would fail the strict scrutiny test because it is not narrowly tailored to further a compelling government interest.[5]

Selective enforcement of the 2005 Tobacco Fee would also violate the Uniformity and Equal Protection clauses because it would arbitrarily and unfairly distinguish among tobacco product makers in imposing the Fee. In *National Tea Co. v. State*, 205 Minn. 443, 286 N.W. 360

[5] Unlike the Settling Defendants, which the State alleged committed fraud, falsely advertised their products and violated anti-trust laws while engaged in a "unified campaign of deceit and misrepresentation" to conceal information regarding the health effects of smoking, the State has not alleged, and cannot establish, similar conduct on the part of CITMA members. Without engaging in culpable conduct, which has not been alleged by the State, CITMA members cannot lawfully be punished merely for selling cigarettes, which conduct is entirely lawful. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 138-39 (2000).

(1939),[6] the Minnesota Supreme Court held unconstitutional a sales tax which imposed different rates of taxation on stores selling the same merchandise based solely on the merchant's sales volume. As the Minnesota Supreme Court explained, the law taxed "different persons" at "different rates" for the "privilege of doing the same act." *Id.* at 361. Accordingly, the Court held that the tax was arbitrary, unfair, and unequal, and that it therefore violated the Uniformity Clause. *Id.*

Selective enforcement of the 2005 Tobacco Fee would be indistinguishable from the tax struck down in *National Tea*. As in *National Tea*, such selective enforcement would impose a different tax on "different persons" for the "privilege of doing the same act," with "different" sellers being "taxed at different rates for performing the same acts." *Id.* at 361. There is no rational, legitimate difference between the tobacco products sold by the Settling Defendants and the products sold by non-settling manufacturers such as CITMA members. Both groups manufacture and sell essentially the same tobacco products. The only difference is that the Settling Defendants agreed to make annual payments to the State and to surrender their First Amendment rights pursuant to the Settlement Agreement to avoid liability for fraud, false advertising, and anti-trust

[6] The Minnesota Supreme Court issued two opinions over two years in *National Tea*. First, in 1939, the Minnesota Supreme Court ruled that a state statute imposing a sales tax which varied from .05% to .85% of a sale based on the merchant's volume was unconstitutional because it was arbitrary, unequal and discriminatory. 205 Minn. at 449, 286 N.W. at 363. Following remand from the United States Supreme Court, the Minnesota Supreme Court clarified that the sales tax violated the Uniformity Clause of the Minnesota Constitution. 208 Minn. 607, 608, 294 N.W. 230, 231(1940).

violations. No such allegations have ever been made, let alone proven, by the State against any CITMA member.

Further, pursuant to Minn. Stat. § 297F.24, CITMA members' and other non-settlement manufacturers' tobacco products are already subject to a tax for which the Settling Defendants are exempt, and which is over and above the general state excise tax on tobacco products. *See CITMA v. State*, 685 N.W.2d 467 (Minn. Ct. App. 2004) (review granted Nov. 16, 2004) (ruling from Minnesota Supreme Court pending). Thus, selective enforcement of the 2005 Tobacco Fee would be arbitrary, unfair, unequal, and irrational, and therefore would be unconstitutional under the Equal Protection Clause and the Uniformity Clause. *Id.*

CITMA members do not challenge the State's ability to tax tobacco products, so long as all tobacco product makers are treated equally. However, laws should not be selectively enforced against only certain manufacturers' products and exempt others when there is no reasonable basis for the distinction.

C. Selective Enforcement of the 2005 Tobacco Fee Would Violate the Minnesota Constitution Prohibition Against Special Legislation

Article 12, section 1 of the Minnesota Constitution expressly prohibits the enactment of "special legislation":

> In all cases when a general law can be made applicable, a special law shall not be enacted. . . . Whether a general law could have been made applicable in any case shall be judicially determined without regard to any legislative assertion

> on that subject. *The legislature shall pass no local or special law . . . granting to any private corporation, association, or individual any special or exclusive privilege, immunity or franchise whatever.*"

Minn. Const. art. XII § 1 (emphases added).

This constitutional provision requires that a law's classification "be based upon substantial distinctions, which make one class substantially different, in a real sense, from another." *In Re Tveten*, 402 N.W.2d 551, 558 (Minn. 1987). Accordingly, "[a] law will be considered to be general if the class to which it applies justifies a statute particular to the class in the matters addressed in the law, but if the classification is so patently arbitrary as to demonstrate constitutional evasion, the courts will void the enactment." *Id.* (citing *State ex rel Flaten v. Indep. Sch. Dist. of Granite Falls*, 174 N.W. 414 (Minn. 1919)).

In *Tveten*, the Minnesota Supreme Court addressed whether the prohibition on special legislation was violated by a statute that provided a limitless exemption in bankruptcy for annuities and life insurance policy benefits if such annuities or policies were provided by a fraternal benefits society, but provided only a limited exemption for policies and annuities issued by for-profit insurance companies. *Id.* at 559-60. Thus, although the insurance policies or annuities were identical, the treatment under the statute was determined *solely* on the basis of *who* issued the policy or annuity. *Id.* at 559. The Court held that this justification provided "an insufficient rational basis for differencing between similarly placed debtors and their creditors." *Id.* Accordingly, the Court held the statute violated the constitutional provision against special legislation. *Id.*

In this case, selective enforcement of the 2005 Tobacco Fee would be identical in all relevant aspects to the unconstitutional law in *Tveten*. As in *Tveten*, such selective enforcement would treat identical products in substantially different ways based *solely* on *who* manufactures the product, rather than based on any legitimate or rational distinction involving the products themselves. In this case, the distinction would be even more irrational than in *Tveten* because the selective enforcement would exempt from taxation products made by companies who were sued by the State for their wrongdoing while imposing the Fee on products made by companies that have never been accused of similar wrongdoing, and who are already paying taxes on their products for which the Settling Defendants are exempt. *See* Minn. Stat. § 297F.24.

D. Selective Enforcement of the 2005 Tobacco Fee Would Transform the Law Into an Unconstitutional Bill of Attainder

Selective enforcement of the 2005 Tobacco Fee would transform the law into an unconstitutional Bill of Attainder[7] because it would penalize CITMA members and other non-settling manufacturers for purported conduct which has never been alleged or proved by the State in any court.

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[7] Article I, Section 11 of the United States Constitution provides that: "No state shall . . . pass any Bill of Attainder." Similarly, the Minnesota Constitution provides that "no bill of attainder . . . shall be passed." Minn. Const. art. I, § 11. In determining whether a statute violates the Minnesota Constitution's or the United States Constitution's prohibitions against bills of attainder, the Minnesota Supreme Court applies the same analysis. *See Reserve Mining Co. v. State*, 310 N.W. 487, 490-92 (Minn. 1981).

A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468 (1977). The prohibition against bills of attainder forbids state legislatures from assuming judicial functions or conducting trials. *United States v. Brown*, 381 U.S. 437, 442 (1965). This provision was included in the Constitution "not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply – trial by legislature." *Id.*

A law is an unconstitutional bill of attainder if it: (1) applies to designated individuals or groups; and (2) imposes punishment. *Nixon*, 433 U.S. at 474. Selective enforcement of the 2005 Tobacco Fee would transform the law into an unconstitutional bill of attainder under this two-part analysis.

First, selective enforcement of the 2005 Tobacco Fee would result in the Fee applying only to designated entities – tobacco product makers who did not participate in the Settlement Agreement and surrender their First Amendment rights. *See Brown*, 381 U.S. at 450 (law that did not "set forth a generally applicable rule . . . and leave to courts and juries the job of deciding what persons . . . possess the specified characteristics" violated the Bill of Attainder Clause). The number of such manufacturers is not relevant to the analysis. A bill of attainder may apply to "relatively large groups of people, sometimes by description rather than name." *Id.* at 461.

Second, selective enforcement of the 2005 Tobacco Fee would inflict punishment on CITMA members and other non-settling manufacturers. In this case, while nominally designated as a "fee," selective enforcement of the 2005 Tobacco Fee would, in effect, act as a fine that punishes CITMA members and non-settling manufacturers for their purported conduct – conduct similar to that alleged against the Settling Defendants, but neither asserted nor proved with respect to CITMA members. *See Carmichael v. S. Coal & Coke Co.*, 301 U.S. 495, 508 (1937) ("The particular name which a . . . legislature may give to a money payment commanded by its statute is not controlling here when its constitutionality is in question."). As Chief Justice John Marshall famously stated, "the power to tax involves the power to destroy." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819). The State sued the Settling Defendants based on their past fraudulent and unlawful conduct, and the Settling Defendants settled with the State to avoid liability for such conduct, including potential punitive damages.

Any claim that selective enforcement of the 2005 Tobacco Fee would not violate the Bill of Attainder Clause because it would apply only to future activities (the prospective sale of tobacco products) should be rejected as being at odds with the Constitution. The United States Supreme Court has repeatedly held that, "[w]hen past activity serves as 'a point of reference for the ascertainment of particular persons ineluctably designated by the legislature' for punishment, the Act may be an attainder." *Selective Serv. Sys. v. Minn. Pub. Interest Research Group*, 468 U.S. 841, 847 (1984) (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 324 (1866)). CITMA members' and other non-settling manufacturers' past activity – failing to

relinquish their First Amendment rights and make annual settlement payments to the State – would serve as the *only* basis for the Fee. The fact that CITMA members would have the "option" of "voluntarily" terminating their sales of tobacco products to "avoid" the Fee would have no constitutional significance. If it did, governments could render every law immune from scrutiny under the Bill of Attainder Clause merely by including a provision allowing parties to "voluntarily" agree to cease their lawful conduct in the future to avoid the punishment inflicted by the law. Of course, this is not the law. *See Brown*, 381 U.S. at 449-52, 458-59 (holding unconstitutional as a bill of attainder a federal law that prospectively denied members of communist party from holding a leadership position in a union even though the individuals could have voluntarily sought a different position); *United States v. Lovett*, 328 U.S. 303, 315-16 (1946) (holding unconstitutional as a bill of attainder a federal law that prospectively denied certain government employment to certain individuals even though the individuals could have voluntarily sought different employment); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866) (holding unconstitutional as a bill of attainder a state law requiring persons to take a loyalty oath as a prerequisite to continuing to practice a profession, even though the individuals could have voluntarily ceased practicing their profession in Missouri); *Nixon*, 433 U.S. at 476 n.40 ("[P]unishment is not restricted purely to retribution for past events, but may include inflicting deprivations on some blameworthy or tainted individual in order to prevent his future misconduct.") (citing *Brown*, 381 U.S. at 458-59).

IV. CONCLUSION

For the above-stated reasons, CITMA respectfully requests that this Court deny Settling Defendants' Motion to Enforce Settlement Agreement or, if this Court grants the motion, it should enjoin the State from enforcing the 2005 Tobacco Fee against all tobacco products.

Dated: September 20, 2005

Respectfully submitted,

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Minnesota Statutes Section 297F.24 (2006)

297F.24 FEE IN LIEU OF SETTLEMENT.

Subdivision 1. **Fee imposed.** (a) A fee is imposed upon the sale of nonsettlement cigarettes in this state, upon having nonsettlement cigarettes in possession in this state with intent to sell, upon any person engaged in business as a distributor, and upon the use or storage by consumers of nonsettlement cigarettes. The fee equals a rate of 1.75 cents per cigarette.

(b) The purpose of this fee is to:

(1) ensure that manufacturers of nonsettlement cigarettes pay fees to the state that are comparable to costs attributable to the use of the cigarettes;

(2) prevent manufacturers of nonsettlement cigarettes from undermining the state's policy of discouraging underage smoking by offering nonsettlement cigarettes at prices substantially below the cigarettes of other manufacturers; and

(3) fund such other purposes as the legislature determines appropriate.

Subd. 2. **Nonsettlement cigarettes.** For purposes of this section, a "nonsettlement cigarette" means a cigarette manufactured by a person other than a manufacturer that:

(1) is making annual payments to the state of Minnesota under a settlement of the lawsuit styled as State v. Philip Morris Inc., No. C1-94-8565 (Minnesota District Court, Second Judicial District), if the style of cigarettes is included in computation of the payments under the agreement; or

(2) has voluntarily entered into an agreement with the state of Minnesota, approved by the attorney general, agreeing to terms similar to those contained in the settlement agreement, identified in clause (1) including making annual payments to the state with respect to its national sales of the style of cigarettes, equal to at least 75 percent of the payments that would apply if the manufacturer was one of the four original parties to the settlement agreement required to make annual payments to the state.

Subd. 3. **Collection and administration.** The commissioner shall administer the fee under this section in the same manner as the excise tax imposed under section 297F.05 and all of the provisions of this chapter apply as if the fee were a tax imposed under section 297F.05. The commissioner shall deposit the proceeds of the fee in the general fund.